TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 910

A. B. KIRSCHBAUM COMPANY, PETITIONER,

vs.

PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 29, 1942.

CERTIORARI GRANTED MARCH 2, 1942.

INDEX.

	Page
Proceedings in U. S. C. C. A., Third Circuit	1
Appendix to appellant's brief	1
Appendix to appellee's brief	187
Minute entry of argument and submission	211
Opinion, Maris, J.	213
Judgment	223
Clerk's certificate	223
Order allowing certiorari	224

IN THE

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT.

OCTOBER TERM, 1941. No. 7733.

PHILIP B. FLEMING, Administrator of the Wage and Hour Division, United States Department of Labor,

vs.

A. B. KIRSCHBAUM COMPANY, a Pennsylvania Corporation,

Appellant.

Appendix to Appellant's Brief.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Martin & Lyle, 302 Penfield Bldg., Phila., Pen. 0665, Keystn Race 6067.

INDEX.

	Page
Docket Entries	1
Amended Complaint	3
Answer to Amended Complaint	8

Testimony:

Plaintiff's	Dir.	Cr.	Re-Dir.
Arthur H. Chalker	15		
William Mentzel	19	32	34
George Simon	35		
Harry Gallagher	43	47	
Samuel H. Fleming	48		
George Epps	54	61	
Nick Cattelise	62		
McKinley Edwards	65	70	71
Charles Moetsch	72	79	
Ben Rash	82	89	93
Louis Casciato	94	103	
Admissions by Defendant for Purposes of this case	105		
Adolph W. Haber	106	114	117
Nicholas D'Alonzo	118	129	
Samuel Sharlit	134	141	
Irving Glonninger	144	151	154
Frederick L. Hewes	155	162	

Defendant's:

Edwin G. Frank	165
Plaintiff's Requests for Findings of Fact and Conclusions of Law	168
Opinion, Kirkpatrick, J. sur Pleadings and Proofs	175
Judgment	181
Exceptions of Defendant to Findings of Fact and Conclusions of Law	183
Order of Court Suspending Injunction Pending Appeal	185

IN THE

District Court of the United States

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION FILE No. 798.

PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

Plaintiff,

v.

A. B. KIRSCHBAUM COMPANY, a Pennsylvania Corporation,

Defendant.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES.

Mar. 14, 1940	Complaint, filed.
" 14, "	Summons exit.
" 25, "	Summons returned: "on Mar. 14, 1940 served" and filed.
" 26, "	Appearance of Sidney L. Krauss, Esq., and Wm. Clarke Mason, Esq., for Defendant filed.
" 27, "	Motion for more definite statement filed.
Apr. 4, 1940	Order to place case on Argument List filed.
" 15, "	Argued sur motion for more definite statement. Eo die: Motion granted.

"	19, "	Amended Complaint filed.
"	26, "	Answer to Amended Complaint filed.
May	11, 1940	Order to place case on Trial List filed.
Nov.	15, 1940	Trial — (Kirkpatrick J.) Witnesses Sworn.
"	18, "	Trial concluded by 12/23/40.
Dec.	2, 1940	Testimony filed (2 vol.)
Apr.	2, 1941	Opinion, Kirkpatrick, J., granting judgment for plaintiff filed.
"	28, "	Judgment in favor of Plaintiff granting Injunction filed. 4/28/41 noted.
"	28, "	Exceptions on behalf of Defendant to findings of the Court filed.
"	28, "	Defendant's notice of appeal filed. 4/29/41 Copy to J. M. Gallagher, Esq.
"	28, "	Bond for costs sur appeal in sum of $250 with Fidelity & Deposit Company of Md., surety filed.
"	28, "	Motion for stay of injunction pending appeal filed.
"	28, "	Order of Court suspending injunction pending appeal filed. 4/28/41 noted.
"	28, "	Supersedeas bond in sum of $1000 with cash security and Order of Court approving bond filed. 4/28/41 noted.
"	28, "	Copy of Clerk's Notice to U. S. Circuit Court of Appeals filed.
May	17, 1941	Statement of Points on which defendant intends to rely, filed.
"	17, "	Designation of contents of record on appeal, filed.
"	20, "	Plaintiff's requests for findings of fact and conclusions of law, filed.
"	26, "	Appellee's designation of additional portions of record on appeal filed.
"	26, "	Acknowledgment of service of designation by appellee filed.

PLAINTIFF'S AMENDED COMPLAINT.
(Filed Apr. 19, 1940.)

I. Plaintiff brings this action to enjoin defendant from violating the provisions of Section 15(a)-(2) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; U. S. C., Title, 29, Sec. 201 *et seq.*), hereinafter called the "Act".

II. Jurisdiction of this action is conferred upon the Court by Section 17 of the Act.

III. Defendant is, and at all times hereinafter mentioned was, a corporation organized under and existing by virtue of the laws of the State of Pennsylvania, having its principal office and place of business at Broad and Carpenter Streets, Philadelphia, Pennsylvania, within the jurisdiction of this Court.

IV. Defendant is the owner of a six-story and basement building situated at the southeast corner of Broad and Carpenter Streets, in the city of Philadelphia, Pennsylvania, formerly occupied by defendant as a factory for the production of men's clothing but now operated as a loft building, portions of which are leased by defendant to various tenants who engage in the production in said building of goods for interstate commerce, to wit: men's clothing, uniforms and pants, boys' wash suits, and sweaters and bathing suits, and other portions of said building are leased to a tenant engaged in the receipt and warehousing in said building of furniture from states other than Pennsylvania and the shipment of furniture from said building to states other than Pennsylvania.

V. All of the tenants who occupy the first, second, third, fifth and sixth floors of defendant's building are engaged in the production of men's clothing, uniforms and pants, boys' wash suits, and sweaters and bathing suits, in

the course of which they receive raw materials, partly finished garments and finished garments from and through states other than the State of Pennsylvania, and ship out materials, partly finished garments and finished garments from their places of business in defendant's said building in Philadelphia, to, into, and through states other than the State of Pennsylvania, and the tenant occupying the basement is engaged in interstate commerce as aforesaid.

VI. Defendant, pursuant to agreements of lease with its said tenants and in consideration of the rentals paid by said tenants and other payments by said tenants, employs in said building employees who are engaged in interstate commerce and in the production of goods for interstate commerce as defined by Section 3(j) of the Act, or in processes or occupations necessary thereto, such employees being engaged *inter alia* in the operation of elevators within the building for the use of the tenants, their employees, customers and visitors, and for the transportation of goods shipped to the said tenants from outside the State of Pennsylvania and for the transportation of goods produced by the said tenants and shipped by them to consignees outside the State of Pennsylvania; in the transportation and handling of the furniture, raw materials, partly finished garments and finished garments belonging to or produced by the tenants in connection with the shipment of the said articles in interstate commerce or their production for interstate commerce; in the production and generation of steam for the operation of the said elevators, for the heating of the building and the parts thereof used by the said tenants in interstate commerce and in the production of goods for interstate commerce, and for the operation of machines and equipment used by the said tenants and their employees in the production of goods for interstate commerce; in the maintenance and repair of machines, equipment, fixtures and premises used by the said tenants and their employees in interstate commerce and in the produc-

tion of goods for interstate commerce; in the guarding and watching of the premises, equipment, materials and merchandise of the said tenants used in interstate commerce and in the production of goods for interstate commerce; in the cleaning, maintenance and repair of those portions of the building used and occupied by the said tenants in interstate commerce and in the production of goods for interstate commerce and other portions of the building used in common by said tenants and their employees engaged in the production of goods for interstate commerce and in interstate commerce; and in the performance of other work, duties, processes and occupations in interstate commerce, and in the production of goods for interstate commerce for and on behalf of the said tenants.

VII. During the period beginning October 24, 1938, the effective date of Section 6(a) (1) of the Act, and continuously through October 23, 1939, defendant paid to some of its aforesaid employees wages at rates less than twenty-five cents (25¢) an hour for their employment in interstate commerce and in the production of goods for interstate commerce, as aforesaid; and, during the period beginning October 24, 1939, the effective date of Section 6(a) (2) of the Act, and continuously to the date hereof, defendant has paid to some of its aforesaid employees wages at rates less than thirty cents (30¢) an hour for their employment in interstate commerce and in the production of goods for interstate commerce, as aforesaid. By failing and refusing to pay its said employees wages at rates not less than the said rates during the said periods, defendant has violated and is violating the provisions of Sections 6 and 15(a) (2) of the Act.

VIII. During the period beginning October 24, 1938, the effective date of Section 7(a) (1) of the Act, and continuously through October 23, 1939, defendant employed certain of its aforesaid employees, who were engaged in

interstate commerce and in the production of goods for interstate commerce, as aforesaid, for workweeks longer than forty-four (44) hours, and did fail and refuse to compensate the said employees for their employment in excess of forty-four (44) hours in such workweeks at rates not less than one and one-half times the regular rates at which they were employed, and, in fact, did fail and refuse to compensate them for such excess hours at any rates greater than the regular rates at which they were employed; and, during the period beginning October 24, 1939, the effective date of Section 7(a) (2) of the Act, and continuously to the date hereof, defendant has employed certain of the aforesaid employees, who were engaged in interstate commerce and in the production of goods for interstate commerce, as aforesaid, for workweeks longer than forty-two (42) hours, and has failed and refused to compensate the said employees for their employment in excess of forty-two (42) hours in such workweeks at rates not less than one and one-half times the regular rates at which they were employed, and, in fact, has failed and refused to compensate them for such excess hours at any rates greater than the regular rates at which they were employed. By employing the said employees for workweeks in excess of the said hours during the said periods without compensating them for their employment in excess of the said hours in such workweeks at rates not less than one and one-half times the regular rates at which they were employed, defendant has violated and is violating the provisions of sections 7 and 15(a) (2) of the Act.

IX. The goods produced by defendant's tenants in defendant's building at Broad and Carpenter Streets, Philadelphia, Pennsylvania, compete with similar goods produced in other states and defendant's tenants in their said businesses compete with manufacturers of men's clothing, uniforms and pants, boys' wash suits, and sweaters and bathing suits, and dealers in furniture located in other states.

X. Defendant has, since the effective date thereof, continuously violated the aforesaid provisions of the Act and threatens and intends to continue to violate the said provisions unless enjoined and restrained by a judgment of this Court.

XI. A judgment enjoining and restraining the violations hereinabove alleged is specifically authorized by Section 17 of the Act.

WHEREFORE, plaintiff demands judgment enjoining and restraining defendant, its officers, agents, servants, employees and attorneys, and all persons acting or claiming to act in its behalf and interest, from violating the provisions of Section 15(a) (2) of the Act, both permanently and during the pendency of this action, and such other and further relief as may be necessary and appropriate.

/s/ GEORGE A. MCNULTY,
General Counsel,
/s/ IRVING J. LEVY,
Assistant General Counsel,
/s/ J. M. GALLAGHER,
Regional Attorney,
/s/ ERNEST N. VOTAW,
Attorney,
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DEFENDANT'S ANSWER TO AMENDED COMPLAINT.

(Filed April 26, 1940.)

The defendant, A. B. Kirschbaum Company, denying that the amended complaint herein is a full or fair compliance with the order of the court upon the defendant's motion for a more definite statement filed in this cause and reserving all of its rights to complain thereof, files this its answer to the said amended complaint as follows:

I. Admits that there is the "Act" described in paragraph I of the amended complaint but denies that it is a legal foundation for the action brought by the plaintiff herein.

II. Denies the averments contained in paragraph II of the amended complaint.

III. Admits the averments contained in paragraph III of the amended complaint.

IV. Denies, or is without knowledge or information sufficient to form a belief as to the truth of, the averments contained in paragraph IV of the amended complaint, except as hereinafter expressly admitted.

Admits that the defendant is the owner of a six-story and basement building situated at the southeast corner of Broad and Carpenter Streets, in the City of Philadelphia, Pennsylvania; that said building was formerly occupied by defendant as a factory for the production of men's clothing but it is now operated as a loft building and that the defendant does not now engage, nor has it since October 24, 1938 engaged, in any manufacturing, either in said building or elsewhere; and that portions of said building are now leased by defendant to various tenants, some of whom engage in the production in said building of goods

for interstate as well as intrastate commerce, some of whom engage in the production in said building of goods for sale at retail either on said premises or in Philadelphia, and at least two others of whom make no shipment of merchandise from said building to consignees outside the City of Philadelphia.

Also admits that the basement of said building is leased to Lit Brothers, a Pennsylvania corporation, engaged in the conduct and operation in Philadelphia of a retail department store, and that said basement is utilized as a warehouse by Lit Brothers in the conduct and operation of said retail business, and that some of the furniture stored in said basement is shipped to Lit Brothers from states other than Pennsylvania.

V. Denies, or is without knowledge or information sufficient to form a belief as to the truth of, the averments contained in paragraph V of the amended complaint, except as hereinafter expressly admitted.

Admits that each of the following articles, to wit: men's clothing, uniforms and pants, boys' wash suits, and sweaters and bathing suits, are produced in said building by one or more of the defendant's tenants who occupy the first, second, third, fifth and sixth floors, or portions thereof, of said building. Admits further according to the best of its knowledge that in the course of the production of the articles aforesaid, one or more of said tenants receives raw materials from and through states other than the State of Pennsylvania, as well as from points in the State of Pennsylvania; that at least two of said tenants receive partly finished garments from points in the State of Pennsylvania only; that one or more of said tenants ship out or deliver finished garments, to, into and through states other than the State of Pennsylvania, as well as to points within the State of Pennsylvania; and that at least one tenant ships out finished garments to points in the State of Pennsylvania only.

VI. Denies the averments contained in paragraph VI of the amended complaint except as hereinafter expressly admitted.

Defendant admits that as the owner of said loft building, it employs and has employed since October 24, 1938, certain persons necessary properly to operate, maintain and protect its said building as a place in which to perform the obligations assumed by the defendant as landlord under the agreements of lease with its several tenants, but it denies that any employee as its employee while engaged in any service for it, is engaged in interstate commerce, or in the production of goods for interstate commerce, or in processes or occupations necessary thereto, within the meaning of the Act or otherwise.

Defendant avers that it engages, inter alia, persons who from time to time operate the elevators in the said building, which are made available for use by said tenants and their employees and some of which are made available for use by said tenants, customers and visitors, and in one or more of which are carried from time to time goods shipped to one or more of said tenants from points either within or outside the State of Pennsylvania, and from time to time goods produced by one or more of said tenants and eventually shipped by one or more of them to consignees either within or outside the State of Pennsylvania, as well as other goods, the sale and delivery of which are made at retail to the customers of certain of the said tenants in the portions of the building occupied by them for the conduct of their businesses. Defendant denies that said elevator operators or any other employees of the defendant are employed by the defendant for or are engaged in the handling of any of the goods belonging to or produced by the tenants of the defendant, whether shipped to said tenants or by them.

Defendant further avers that it engages, inter alia, persons who from time to time engage in the production

and generation of steam for the operation of said elevators, for the heating of said building and for use by or sale to certain of the said tenants for use by them (in the portions of the building occupied by them) for such purposes as such steam may be lawfully used by the said tenants within the provisions of said leases. The defendant also employs from time to time certain persons for the purpose of guarding and watching the building and its contents and for the purpose of maintaining and repairing the said building as and when the same may be required and also for the purpose of cleaning those portions of the building not leased to said tenants. Defendant however denies that any employee as an employee of the defendant is engaged in the maintenance and repair of machines, equipment and fixtures owned by or belonging to said tenants or in the cleaning of such portions of the building leased to said tenants.

Defendant is without knowledge or information sufficient to form a belief as to the extent to which at any given time or times since October 24, 1938, any tenant of the defendant in the said building was engaged in interstate commerce or in the production of goods for interstate commerce as distinguished from intrastate commerce or the production of goods for intrastate commerce and if such facts are material, defendant demands proof thereof at the trial of this cause.

Defendant, as the owner of the building described in the amended complaint, by leasing space in the said building to tenants over which defendant has no control and with respect to which it has no relationship other than to render service as a landlord in accordance with the provisions of the leases entered into with such tenants, is engaged in business exclusively within the City of Philadelphia, in the Commonwealth of Pennsylvania, and not otherwise, and none of the defendant's activities as such owner and operator of the said building, and none of the activities of its employees for which they are employed by

the defendant or for which defendant was liable to compensate such employees constitute, either directly or indirectly, interstate commerce or the production of goods for interstate commerce or processes or occupations necessary thereto, within the meaning of the Act, or otherwise.

VII. Denies the averments contained in paragraph VII of the amended complaint, except that defendant admits that during the period beginning October 24, 1938 and ending October 23, 1939, it paid to one of its employees engaged in and about said building to operate, maintain and protect the same, wages at rates less than twenty-five cents (25¢) an hour, and during the period beginning October 24, 1939 and ending with the date hereof, it paid to some of its aforesaid employees engaged in and about said building, wages at rates less than thirty cents (30¢) an hour.

VIII. Denies the averments contained in paragraph VIII of the amended complaint, except that defendant admits that during the period beginning October 24, 1938 and ending October 23, 1939, it employed certain of its aforesaid employees in and about said building for workweeks longer than forty-four (44) hours, and, during the period beginning October 24, 1939 and ending with the date hereof, it employed certain of its aforesaid employees in and about said building for workweeks longer than forty-two (42) hours, and did not compensate the said employees for their employment in excess of forty-four (44) hours during the period first above mentioned, or for their employment in excess of forty-two (42) hours during the period last above mentioned, at rates greater than the regular rates at which they were employed.

IX. States that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph IX of the amended com-

plaint, and if material, defendant demands proof thereof at the trial of this cause.

X. Dénies the averments contained in paragraph X of the amended complaint.

XI. Denies the averments contained in paragraph XI of the amended complaint.

AS FURTHER, SEPARATE AND ADDITIONAL DEFENSES IN LAW TO THE ALLEGED CAUSE OF ACTION SET FORTH IN THE AMENDED COMPLAINT:

XII. Defendant avers that the court lacks jurisdiction over the subject matter of the action.

XIII. Defendant avers that the complaint fails to state a claim against the defendant upon which relief can be granted for the reasons, inter alia, that it is vague, indefinite and insufficient, and has no foundation in the "Act" upon which said complaint is alleged to be based.

XIV. Defendant avers that it as well as its employees are exempt from the provisions of Sections 6 and 7 of the Act under the provisions of Section 13 thereof.

XV. Defendant avers that the "Act" described in paragraph I of the amended complaint is properly interpreted, is not applicable to defendant and/or to the employees of the defendant employed in connection with the operation, maintenance and protection of the premises described in the complaint.

XVI. Defendant avers that the "Act" described in paragraph I of the amended complaint if held applicable to the defendant and/or to the employees of the defendant employed in connection with the operation, maintenance

and protection of the premises described in the complaint, is unconstitutional as contravening Articles V and X of the Amendments to the Constitution of the United States and not within the power delegated to the Congress by Article I Section 8 clause 3 thereof, or by any other provisions of the said Constitution, or any amendment thereto.

Wherefore, defendant demands judgment against the plaintiff dismissing the amended complaint herein and for the costs of this action.

/s/ SIDNEY L. KRAUSS,
Office and P. O. Address,
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Philadelphia, Pa.

/s/ WM. CLARKE MASON,
Office and P. O. Address,
2107 Fidelity-Phila. Trust Bldg.,
Philadelphia, Pa.
Attorneys for Defendant.

Dated, April 26, 1940.

TESTIMONY.

Before Hon. William H. Kirkpatrick, *J.*

Philadelphia, Pa., November 15, 1940.

Present:

Ernest N. Votaw, Esq.,
Abner Brodie, Esq., and
Edward J. Fruchtman, Esq., representing the Plaintiff;

Sidney L. Krauss, Esq.,
Wm. Clark Mason, Esq.,
Frederick H. Knight, Esq., and
Martin P. Snyder, Esq., representing the Defendant.

PLAINTIFF'S EVIDENCE.

Arthur A. Chalker, having been duly sworn, was examined and testified as follows (Tr. pp. 33-46 inc.):

Direct-examination.

* * * (Tr. pp. 33, 34.)

By Mr. Votaw:

Q. Mr. Chalker, you are employed by the defendant, the A. B. Kirschbaum Company?

A. I am.

Q. In what capacity?

A. As cashier.

Q. How long—

A. And bookkeeper.

Q. How long have you been with them?

A. Since 1890.

Q. Since 1890, that was before they were incorporated?

A. Yes.

Q. Do you know when they were incorporated?

A. 1922; I believe, May 12th—or May 22nd.

Q. What are your duties?

A. To keep the books, send rent bills to our tenants at the end of the month, count the pay-roll and pay it to our ten or twelve employees.

Q. What are your hours?

A. From eight till four, five days a week. I don't come in on Saturday.

Q. And with how long for lunch?

A. An hour for lunch.

* * * (Tr. pp. 35-38 inc.)

Q. Mr. Chalker,—

THE COURT: It doesn't look to me as though there are going to be a great many facts here in this suit, really. I don't see why this suit should take a very long time, but go ahead.

By MR. VOTAW:

Q. —did you bring with you the leases with your tenants?

A. We have.

Q. Could you produce them, please?

THE COURT: Well, is that all necessary? It is admitted that they lease the building to a number of tenants. Can't you just tell us who they are?

MR. VOTAW: Well, I would like to have these marked for identification.

THE COURT: Well, what is the use, what is the use of loading up this record with things that are absolutely admitted, gentlemen? Let's not do it if you can avoid it.

Just tell us who your tenants are, Mr. Chalker. You know who they are.

THE WITNESS: I will read them off.

THE COURT: Yes, you read them off.

THE WITNESS: Atlas Ticket Company.

THE COURT: Yes.

THE WITNESS: Nicholas D'Alonzo, N:—N for Nathan—Feldman, Fishman and Tobin, J. B. Haber, Incorporated, Owl Advertising Company, Progressive Clothing Manufacturing, Irving Pincus and Brothers, J. Reed's Sons, I. and C. Shivak, Incorporated, Progressive Tailoring, Trading as Ridgway Sportwear Company.

By THE COURT:

Q. Now, were they all tenants on April 19, 1940?
A. Yes.
Q. And they were the only tenants of the building?
A. Only tenants.

THE COURT: All right.

By MR. VOTAW:

Q. There was one other tenant who has since removed. Lit Brothers was in the basement and has since moved out.
A. He has removed.

By The Court:

Q. Lit Brothers was in the basement on April, 1940?

A. Yes, but they removed, August 31st.

* * * (Tr. 40-44 inc.)

By Mr. Votaw:

Q. Perhaps it might be well at this time, Mr. Chalker, if you could describe this building to the Court so that the Court may have an idea of what it is like.

A. The Kirschbaum building Broad and Carpenter, was built in about 1902. It is a six-story building, 372 by 85—

The Court: Now, the defendant admits it is a six-story and basement building situated at the southeast corner of Broad and Carpenter Streets, in the city of Philadelphia, Pennsylvania, and that it was formerly occupied by the defendant as a factory for the production of men's clothing but it is now operated as a loft building.

That is what it admits. Now, is there anything you want to add to that that is of importance? Don't go over all that.

By Mr. Votaw:

Q. Well, where are the elevators and stairways situated?

A. The elevators are in what we call the outside part of the building—I mean, the stairways, rather, both at the north end of the building and the south end. There are two elevators at the north end of the building, and one in the rear of the building, at Washington Avenue.

Q. They are all on the east side of the building?

A. All on the east side of the building.

Q. And there is a stairway or a fire tower, is there not, in the middle of the building on the east side?

A. Yes, there are fire towers and stairways at the

Carpenter Street entrance, in the middle of the building, and also at Washington Avenue, east.

Q. Yes.

THE COURT: It would be very simple if we had a plan or a figure.

MR. BRODIE: I have, sir. It has some of my notes on it, but I will show it to counsel.

THE COURT: It may be that it is important to know where these elevators are and what they do.

MR. MASON: No objection to that.

THE COURT: All right, received in evidence as P-2.

(Plan of the building of A. B. Kirschbaum Company was marked Exhibit P-2.)

MR. MASON: I think we might note at that point, Mr. Votaw, that the stairways reach to all floors in the building.

By MR. MASON:

Q. Do they not?

A. Yes, sir.

MR. VOTAW: Cross-examine.

MR. MASON: No questions.

MR. VOTAW: That is all, Mr. Chalker.

WILLIAM MENTZEL, having been duly sworn, was examined and testified as follows (Tr. pp. 47-79 inc.)

Direct examination.

MR. BRODIE: May it please the Court, at the request of the defendant, and in order to avoid incon-

venience to it, we have agreed that witnesses will be produced in relays,—

THE COURT: All right.

MR. BRODIE: —and so it may be that we at one point or another might run out of witnesses.

THE COURT: Oh, that is perfectly all right.

MR. BRODIE: I hope that will not happen.

By MR. BRODIE:

Q. Mr. Mentzel, you are employed by A. B. Kirschbaum Company?

A. Yes, sir, I am.

Q. That company is the owner of a—

A. Kirschbaum.

Q. —factory building—

A. Yes, sir.

Q. —at Broad and Carpenter Streets, Philadelphia?

A. Yes, sir.

Q. How long have you been employed by A. B. Kirschbaum Company?

A. Well, I think it is about twenty or twenty-one years.

Q. In what capacity are you employed?

A. Well, I used to be a building mechanic and electrician, before I came from the Keystone Watch Case to the Kirschbaum Building. Then at that time they used to have about a hundred steam machines, and after they went out of business, well, then, they rented the building out.

Q. Just a moment, who went out of business?

A. Why, Kirschbaum.

Q. Well, you mean by that, do you, that they stopped manufacturing?

A. Stopped manufacturing.

Q. Clothing?

A. Clothing.

Q. But is it not a fact that they are still in business, operating this factory building?

A. As a loft building.

MR. MASON: I object to the form in which that question is put. Obviously, the witness does not run the Kirschbaum business,—

THE WITNESS: Well, they aren't in business at the present time—

MR. MASON: —and I think we might now have this distinction before us all. The question is that the Kirschbaum Company operates the manufacturing building. The Kirschbaum Company does do no such thing. The Kirschbaum Company, as counsel understands perfectly, is the owner of the building. The landlord rents the space, and does not operate any single industry in the building.

MR. BRODIE: Well, what Mr. Mason is saying is that he does not agree with our interpretation of the law applicable to this case.

MR. MASON: No, I am saying something more than that, I am saying something about facts, and not law.

MR. BRODIE: Well, the facts will be developed by witnesses and the Court can decide after the facts are in—

THE COURT: Well, that is right.

MR. BRODIE: —whether Kirschbaum operates a manufacturing building or not.

THE COURT: That is right, but it is agreed that Kirschbaum directly, itself, does not do manufacturing in the building.

MR. BRODIE: At the present time we will admit

that the defendant does no manufacturing in this building.

THE COURT: That is right.

MR. BRODIE: But we do not admit that the defendant does not operate this building.

THE COURT: That is right, I understand the point.

MR. BRODIE: Nor do we admit that the building is not a manufacturing building.

THE COURT: Yes, that is all right, I understand.

MR. BRODIE: Mr. Stenographer, will you read the last answer of the witness, please?

(The testimony was repeated by the reporter, as follows:

"Q. But is it not a fact that they are still in business, operating this factory building?

"A. As a loft building.")

By MR. BRODIE:

Q. How long has it been since A. B. Kirschbaum Company stopped manufacturing clothing in this building, Mr. Mentzel?

MR. MASON: Well, is that important, Mr. Brodie?

A. About nine years, I think.

MR. BRODIE: Well, if Your Honor please, I represent to the Court that this is a material line of testimony. Now, if Mr. Mason is so anxious to agree to everything it seems to me that he might as well agree to an injunction. This is a material element of our case, and I make that representation.

THE COURT: Well, it is only one question and it isn't worth arguing about, and I will receive it.

By THE COURT:

Q. They stopped manufacturing about nine years ago?
A. About that, Your Honor.

THE COURT: All right.

By MR. BRODIE:

Q. And you worked for A. B. Kirschbaum while it was manufacturing—
A. I certainly—
Q. —in the building?
A. I certainly did.
Q. When did you become an engineer?
A. About—as soon as they give up the business, then I had to get my license, and be in the engine room as engineer and building mechanic at the same time.

* * * (Tr. pp. 51-57 inc.)

Q. Since you have become an engineer what have your duties consisted of?

A. Well, my duties is to come in the morning, blow down the boilers, see that the mud is out, and see that they got the right amount of water in the boilers, see that those boilers are cleaned out every two months, and pack my pumps, keep my pumps in repair, see that the elevator pump is in good condition, watch the elevator rods, because they leak sometimes, take care of a hundred toilets in the Kirschbaum building, and other repairs sometimes I have to do for the tenants.

Q. What kind of pumps do you take care of?

A. Well, I take care of the elevator pump, hydraulic pump, that is one hundred and twenty-five pounds pressure, then I see that the fire pump is taken good care of, and the vacuum pump that is for the heating system, returning water back to the heater, for our boilers to get hot water; then I have a sewer pump, have to be blown down, that takes the excess water and pumps in the sewer,

we aren't allowed to have hot water blow right in the sewer, we have to let it blow in the well, and then pump it out in the sewer, then we have a boiler feed pump, which supplies the boilers the amount of water we want, in case we have a breakdown we change over to the sewer pump, then we have a house pump for drinking water, which supplies all toilets and the drinking water and the ice coolers through the building.

Q. And what force operates these pumps?

A. Well, at ninety pound pressure.

Q. Steam pressure?

A. Steam pressure, ninety pounds.

Q. Where is that pressure generated?

A. In the boiler room, by two boilers.

Q. Who takes care of those boilers?

A. Well, we have a fireman there that takes care of those boilers. There is three shifts, eight hours to the shift.

Q. What duties have you in connection with those boilers?

A. Well, I have got to see that the steam is up and that everything is running O. K., that the place keeps running.

* * * (Tr. pp. 59, 60.)

Q. For what purpose, apart from the operation of the pumps, is steam generated in these boilers?

A. Why, the elevator pump,—

Q. No, for what—

By The Court:

Q. What besides pumps—

A. Oh.

Q. —is steam used for?

A. Oh, for the steam machines, for all the steam machines through the building, steam irons and sponging machines.

Q. What do they do? What do those machines do?

A. Well, they press the clothing for the tailors in the tailor shop, like Progressive Clothing Company, Fishman and Tobin has steam irons, then D'Alonzo, then Pineus has machines, Haber has machines, Feldman, and I think that is about—and Mr. Spivak, I beg your pardon.

By Mr. Brodie:

Q. Do you know how many pressing machines there are in the building?

A. Well, that is hard for me to say, because I have—one time I was up there, there was about, over one hundred and forty. You will have to ask the chief engineer when he comes out. I don't go through the building and count those machines.

Q. How is steam supplied to these various machines?

Well, before I ask you that question, are these machines in the defendant's premises?

A. Absolutely, on each floor they have their own machines, and each one is their own—

Q. Will you describe to the Court how the steam is supplied to these machines?

A. Well, there is a riser, a steam main that runs up to the sixth floor from the basement, and those are branched off to each tenant on each floor, they have their own valves and supply their own steam. Some have traps, and there is one party that has no traps; that is the Progressive Clothing Company.

Q. Is the steam turned on and off daily, or is it continuous?

A. Well, at night, there is some of the tenants, like the D'Alonzo turns his off at night, and Fishman and Tobin turn theirs off then, on the fourth floor, the Government work, they turn those off, that make the Government uniforms, and the third floor leaves theirs on, because they have no trap system, there is about sixty machines stay on all night, except Friday night they are turned off until Monday morning.

Then there is Spivak, he turns his off, and Mr. Haber, and Mr. Pincus, and Mr. Feldman turns his off, except the third floor is kept on all night, because they have no steam traps at all on that floor.

Q. At what pressure is that steam supplied to the tenants?

A. At ninety pounds.

Q. Is that the usual pressure at which steam is generated in a steam heating plant, or is that an unusually high pressure?

A. No, that is the regular pressure we have for the pumps and for the pressing. We daren't have lower than that, because if they draw water you can't press a suit, and having water in your steam, it would bring the coat up. It has got to be absolutely dry, as dry as you can get it.

Q. And is it, therefore, necessary to have steam at a pressure of at least ninety pounds?

A. Yes.

Q. In order to make it effective?

A. You have got to have ninety pounds there. We always have the charts to keep it, in case they kick, we show them, we have a chart there, it is ninety pounds, unless their trap sticks on the floor and they don't by-pass the water.

Q. Do you know for what other purposes steam is generated?

A. Well, they sponge, on the sponging machine, like the Progressive, they have a sponging machine, and Haber, Mr. Haber, has a sponging machine, too.

Q. Do you know what the function of the sponging machine is?

A. Well, they have about an inch pipe—that is hard to tell—

Mr. Mason: Just a moment,—

The Court: Have you got somebody else that operates these machines?

MR. BRODIE: Well, I will bring that out by the tenants.

THE COURT: All right.

MR. BRODIE: All right, sir.

By MR. BRODIE:

Q. Is there any other purpose for the steam that is generated by your boilers?

A. Well, for the engines, to run the engines in the engine room.

By THE COURT:

Q. Run the engines for what, the elevators?

A. No, these are hydraulic elevators, Your Honor.

Q. What are the engines—

A. They are run to supply electricity to the tenants.

Q. Oh.

By MR. BRODIE:

Q. Is that electricity which is generated, I mean, is that a direct current or alternating current?

A. Direct current.

Q. Do you know for what purpose it is generated?

A. Well, it is generated for two of our tenants, like Mr. D'Alonzo—

By THE COURT:

Q. No, but what do they do with it?

A. Well, they use only lights, they have all the lights on the sixth floor, we have a throw-over switch there, for this electricity, Your Honor, to the direct current, and there is one motor that Mr. D'Alonzo has, a three and a quarter horse power, he runs that for a line of sewing machines, then he has no meter up there, but then Mr. Spivak has a meter, which they charge him for motors and lights.

Then we supply our basement and the toilets up to the second floor with our lights, and we used to supply Lit Brothers, but they moved out.

By Mr. Brodie:

Q. Does the electricity generated in the building supply the lights in the elevators?

A. They do, and the stairway.

Q. Now, what other purpose is steam generated for?

A. Well, the steam for all our pumps.

Q. Yes.

A. What I mentioned.

Q. How is the building heated?

A. That is heated by the exhaust steam from our engine, that comes—exhaust that goes in the heater and up through the riser, goes through the heating system, and the water condenses and is pulled back through the vacuum pump, and the hot water thrown in the heater, that we can use. The hotter water we get for the boilers, the better it is. That saves us coal.

Q. Well, your answer is that the building is heated by the steam—

A. Steam.

Q. —which is generated in these boilers?

A. But if we haven't enough in the cold weather we turn the live steam valve on.

Q. And what force runs the elevators?

A. Well, one hundred and twenty-five pounds pressure, water, on the hydraulic elevator pump.

By The Court:

Q. I was going to say, how do you get the pressure in the water?

By Mr. Brodie:

Q. How was that pressure generated?

A. That is from a hydraulic pump, from a hydraulic pump. We have a tank where the water is in, and that pumps up in another tank, which creates a pressure, then we have to pump air in it once in a while to keep air on top of the tank.

By The Court:

Q. What runs the pump?

A. The steam.

By Mr. Brodie:

Q. Do you know how many elevators there are?

A. There are three; two on the Carpenter Street entrance, one passenger and one freight, and one on Washington Avenue is one, freight.

Q. When Kirschbaum was operating in this building do you know how many elevators there were there?

A. Three.

Mr. Mason: That is subject to my objection.

The Witness: Three, the same thing.

Mr. Mason: My general objection.

By Mr. Brodie:

Q. Were they the same elevators?

A. Same elevators.

Q. Apart from the generation of the steam, which is under your control, do you have anything to do with the elevators?

A. Well, I have got to take care of them, pack the cylinders when they sink, and I have got to take care of any elevator that sticks on the floor, I have got to see what is the trouble, or the interlocks on the elevator, see that they are running.

Q. What do you mean by packing the plungers?

A. Well, I have got to take—see, it is up to the

safety device, of the elevator inspector, to see that these elevators don't sink. Well, if an elevator is on the floor, and that elevator would sink while the man is standing outside, she will go below the floor, and if she sinks somebody is liable to step in there and get injured, so it is up to us to keep those elevators on the floor. You have got to pull packing out and pack it. It takes about seven rings. I pack it about every five months or six months.

Q. Is or is not the packing of the plungers essential to the effective operation of the elevators?

A. Oh, it is, you have got to have the packing there.

Q. And do you do anything else in connection with the elevators?

A. Well, I help the tenants out once in a while, when they call me up, look at a motor, or light, or steam machine, sometime.

Q. No, I am referring now to the elevators.

A. Oh, well, that is all we can do. I don't put the cables on. That is up to the elevator—Otis Elevator Company.

Q. Are the cables renewed periodically?

A. They are when the inspector condemns them and he thinks it is proper to have new cables on, it is up to the company to have new cables put on the elevators.

A. Has there been anything else done to the elevators recently?

A. Well, we had safety gates put on it, three safety gates put on it.

Q. What other repairs do you make generally around the building?

A. Well, I have my one hundred toilets to take care of, and the spigots in the washrooms, and the heating system. Sometimes there is a leak on the floor, something like that; just keep everything in repair and running.

Q. Do you have anything to do with the sprinklers?

A. I do.

Q. What do you do?

A. Well, I have got to take care of the sprinkler tank, see that the sprinkler tank is full, and the fire tank in the yard is full, the suction tank, and if the sprinkler leaks, I have got to take a head off and put a new head on the sprinkler, and turn on the water again, and put the seal on the valve.

Q. Do you have anything to do with the radiators by which the various premises are heated?

A. I have.

Q. What do you do with those?

A. Well, I have got to see that the traps are working. Sometimes those traps stick, and they get a little rust in, and then I have got to take them apart and clean them out and see that they are running O. K., get the suction for the heating system.

Q. Have you ever had occasion to move any radiators around?

A. I have. I have taken—put three in the Atlas Ticket Company, took two out of Jacob Reed's, and repaired two up, made two radiators up.

Q. Do you know for what purpose you moved these radiators around?

A. Well, they were—the other ones were all out of commission, so I had to take them out, disband them and put these new ones in there. They were pretty well—

Q. Well, I will put it this way, was it or was it not to suit the convenience of the particular tenants?

A. It was to suit the tenants, where they heat the place.

Q. Do you or do you not know whether all the tenants in this building are engaged in manufacturing?

A. They are all engaged in manufacturing. There is one, I think, one contractor is Mr. Feldman, I believe, I am not sure, he makes—has contract work.

Q. Well, by contract work, what do you mean?

A. He is given—has coats by contracting, just making the coats and shipping them out again.

Q. But does he do the making, the manufacturing?

A. On the coats, yes, he makes them.

Q. On these premises?

A. You are right, there, because it is some contract work, you know. I am not through the building so much.

Q. What man works with you, Mr. Mentzel?

A. Well, there is only the fireman and I, we both work together. If I leave the engine room I tell him to watch the engine while I am out. See, I got to leave sometime.

Q. What is his name?

A. McKinley, Eddie McKinley.

Q. Do you mean McKinley Edwards?

A. That is it, McKinley Edwards, I beg your pardon, I made a mistake.

Q. Are there any other firemen that work with you?

A. There is Pete Rocca, and Pete Rocks. There is two Petes, see.

* * * (Tr. pp. 71-75 incl.)

Cross-Examination.

Mr. Mason: I don't think there is much to ask this witness, except to clarify one phase of his testimony, probably.

By Mr. Mason:

Q. Mr. Mentzel, you testified that as engineer—

A. Yes.

Q. —you were in charge of producing steam?

A. Yes.

Q. Now, steam has been referred to here as live steam—

A. Live steam.

Q. —and exhaust steam.

A. Exhaust steam, yes, sir.

Q. And just to make it perfectly clear, so we will

know what we are talking about, in so far as your testimony is concerned, will you tell us what use is made of the exhaust steam which is produced in the building under your engineer's job?

A. Well, that I told them, that exhaust steam is used in the heating system, through the steam radiators, and brought back again through the condensing pump, and throwing that hot water in the heater again, then pumping that hot water into the boilers, then if we haven't enough in the cold weather with exhaust steam, we turn some of the live steam on.

Q. All right. Now, then, what do you use the live steam for?

A. Live steam for all the pressing machines, the engines, and the pumps.

Q. All right, when you speak of the engine, what engine are you talking about?

A. That is what generates electric for the tenants.

Q. All right.

A. For them two tenants.

Q. Now, you say you generate electricity?

A. Yes.

Q. You generate electricity to light the building, do you not?

A. Just our part in the basement, and the stairway and the elevators.

Q. Well, the whole building?

A. Not the whole building.

Q. Why not?

A. No, because they are tenants, they get their own power, some of the tenants have their own power, only D'Alonzo—

Q. Where do they get that?

A. They get that from the Philadelphia Electric.

Q. Oh, then there is another source of electricity than the engine which you operate?

A. That is just the direct current.

Q. I see.

A. The Philadelphia Electric supplies A. C. in there.

Q. I see.

By The Court:

Q. You only supply two tenants with electricity?

A. Yes.

Q. Do they also get electricity from the Philadelphia Electric?

A. They have, yes, double, a throw-over switch.

Q. Those two tenants?

A. Yes, they have a throw-over switch, I put one for Mr. D'Alonzo, throw-over switch, throw-over, see, at night, he uses from eight o'clock in the morning until five or ten minutes after five in the evening, when he sees it is ten minutes after five he will throw over his switch and use the Philadelphia Electric. And I throw Mr. Spivak's switch over when they do that.

Q. Why is that?

A. That is a double, throw-over switch, see?

Q. Why don't they take it all from the Philadelphia Electric?

A. I think it is cheaper, they get it cheaper, see?

The Court: All right, go ahead.

Mr. Mason: That is all, I just wanted to clarify that.

The Court: That is all.

Re-direct-examination.

By Mr. Brodie:

Q. Just a few questions, Mr. Mentzel. Do you know whether the current supplied by the Philadelphia Electric is direct current or alternating current?

A. Alternating current.

Q. Do you know whether or not alternating current can operate direct current motors?

A. No, it couldn't, unless it was a universal motor, special motor made up for that, universal.

Q. There has been some reference to exhaust steam. That exhaust steam which you referred to is part of the steam which is generated as live steam, isn't it?

A. Live, yes, that is the exhaust from the engines, pumps.

Mr. Brodie: No further questions.

Mr. Mason: That is all, thank you.

George Simon, having been duly sworn, was examined and testified as follows (Tr. pp. 79-92 incl.):

Direct-examination.

By Mr. Votaw:

Q. Mr. Simon, you are employed by A. B. Kirschbaum Company?

A. Yes, sir.

Q. How long have you been employed by them?

A. Well, I would say about seventeen or eighteen years.

Q. And what is your work with Kirschbaum's now?

A. Why, running the freight elevator.

Q. Which freight elevator do you run?

A. Up at the Carpenter Street end.

Q. And when does that start in the morning?

A. Eight o'clock.

Q. And when does it stop in the evening?

A. Six.

Q. And is it used for anything but freight?

A. Well, in the morning I carry up—it is passenger

and freight too, you know, I carry up passengers. That is, well, about quarter after eight, I get them up. That is to help the passenger fellow to get them up.

Q. Who are these passengers?

A. Different people works in the building.

Q. They are the people that work in the building?

A. Work in the building.

By The Court:

Q. Which elevator do you operate?

A. The freight elevator.

Q. Freight.

By Mr. Votaw:

Q. On the north end.

A. North end.

The Court: Oh, north end, all right.

By Mr. Votaw:

Q. Now, how long a time did you—in the morning—did you take up these passengers and employees?

A. Why, from eight until about quarter after eight.

Q. I see, and is it used for passengers at noon time?

A. I take down about two or three loads, about—about five or ten minutes, that is all, and then in the evening it is used again.

Q. In the evening?

A. From five until about quarter after five.

Q. Now, what kind of freight comes in on that elevator?

A. Well, there is cloth comes in from different floors, linings, stuff like that.

Q. How is it packed?

A. Well, there is some of it in bundles, and some of it is in cases.

Q. What is the range in weight, these various packages?

A. Well, I couldn't tell you, I don't handle that. The only thing, I ask the party if it is—if I think it is too heavy to take up, just to show me the bill, let me know the weight, and then I know what I am doing.

Q. Well, what would those weights be on the bills?

A. Well, some of them weighs around—if it is canvas or stuff like that, it runs around seven hundred to a thousand pounds.

Q. What kind of a package would that be in?

A. That would be in a case.

Q. In a case, wooden case?

A. Wooden case.

Q. How often does the freight come in?

A. Well, it ain't—it don't seem to be much coming in now. Some days we are pretty busy. Other days just switch around the opposite way.

Q. I see. Are there any days when none is coming in?

A. No, there is always some comes in.

Q. Always some coming in. Now, do you put the freight on and off the elevator?

A. No, sir, I don't.

Q. Who does do that?

A. The truck driver. He puts it on, takes it off. I just take him up.

Q. I see. The truck driver goes up with the freight?

A. He goes up with the freight.

Q. And takes it off. Now, how about outgoing freight?

A. Same way.

Q. Is there some going out every day?

A. Some going out every day.

MR. MASON: Going up every day?

MR. VOTAW: And out, out every day.

By Mr. Votaw:

Q. And what type of packages does it go out in?

A. Well, there is sometimes, they have a large order, they send some suits out in cases, and then other times in large cartons.

Q. Are there any of the tenants who send out packages regularly, at a particular time in the day, every day?

A. Well, Fishman and Tobin, they send out their freight pretty near the same hour every day.

Q. About what time?

A. Well, about half-past three, I guess, around there. And then they might pick up a few—same fellow calls from there, he takes from the third, well, they might have a couple of cartons, too, to go out.

Q. I see, and what size packages would these be?

A. Well, it ain't always the same size. Some of them is small, like one suit in some of them, maybe might have a half a dozen suits in them.

Q. Are there packages such as could be carried downstairs?

A. I don't think they could. They are a little too heavy.

Q. Does any clothing ever go out on racks?

A. The only clothing goes out on racks, there might be a few coats go out from Jacob Reed, like, Jacob Reed's, on the first floor there.

Q. What is a rack like? Can you describe a rack?

A. Well, it is just a couple of pieces of pipe, like three-quarter pipe, with a top piece, and then rollers on the bottom, and they hang the coats on with hangers, see.

Q. About how long would it be?

A. Oh, well, they are different lengths. Some of them is longer than others.

Q. Could they be carried out?

A. No, sir.

Q. Does it ever happen that more than one truck gets there at the same time?

A. Yes, there is more than one truck sometimes gets there. Two or three may sometimes get in the yard at one time.

Q. How do you tell which to take up first, then?

A. The first ones there.

Q. First come, first served?

A. First come.

Q. Do the trucks wait while—

A. Oh, yes.

Q. —the freight goes up?

A. They wait.

Q. And they wait while the driver goes up to get freight?

A. Yes, they wait, without it is too long, he is up there for a good while, and then I will come down and pick the other one up.

(Tr. pp. 85-87 incl.)

Q. Now, what is the size of the loading platform on the ground floor?

A. Well, I couldn't exactly tell you. I guess it is a platform pretty near the size of that jury box there (indicating).

Q. Is it enclosed at all?

A. Well, it is just one part of it, there is a top over it, and just one end is closed in.

Q. It couldn't be used for storage there?

A. No.

Q. What type of truckmen come?

Mr. Mason: What is their color?

A. What do you mean, what concern?

By Mr. Votaw:

Q. Yes, what concern.

A. Well, it is Pennsylvania Railroad, Scott Brothers, Lippincotts, and different places, firms, like that, truck drivers.

Q. Do you know where they come from?

A. No, I don't.

Q. Do you recall any time when the elevators were shut down for any reason?

A. How is that?

Q. Do you recall any time when the elevators were shut down?

A. The only time they were closed a while, that was—one of them was running, the other was closed—was when they were putting on those safety gates.

Q. I see. Did that have any effect on the—

A. No, sir.

Q. —volume of traffic?

A. No, that didn't have effect.

Q. You say you were employed about seventeen or eighteen years by Kirschbaum?

A. About seventeen or eighteen years.

Q. That goes back to the time when they were manufacturing?

A. Manufacturing.

Q. Clothing?

A. Yes, sir.

Q. Were you also an elevator operator at that time?

A. No, I was—when Mr. Mentzel was in the shop, I was in the engine room for a while.

Q. I see.

A. Just took care of the engines.

Q. I see. Now, at that time, when Kirschbaum was manufacturing clothing, were the elevators used for transporting freight up and down?

A. Oh, they had to fetch their own stuff up and down.

Q. I see.

A. Get their own stuff out.

By The Court:

Q. Was the use substantially the same as it is now?

A. Yes, sir, on the same order.

By Mr. Votaw:

Q. Do you take anything besides freight down on these elevators?

A. Only passengers, only machinery, like if there is a person moving in or coming in, or moving out, of course, we got to take that down for them.

Q. Is rubbish removed by these elevators?

A. Only at this end where I am at, there is only two floors, that is, the second and Jacob Reed, but then there is always a man pushes that on and he takes it off, and takes it back to the back end.

Q. In the morning are you able to take the passengers up as fast as they arrive?

A. Well, don't take so long to get them up, according to—they generally come in different times, you know. If they all come in at one time, of course, it jams us up a little, but don't take long to get them up, both elevators.

Q. Do some of them have to wait?

A. Some of them have to wait their turn, until they get on.

Q. Do you stop at all floors?

A. No, I only take the third and fifth. The passenger, he stops at all floors.

Q. I see, you only take the third and fifth?

A. Third and the fifth.

Q. Would you ever have to skip the third because you were full up from the fifth?

A. Oh, yes, I had that, because sometimes the third wasn't over there to get on, and I had a whole load for the fifth, so I went right up to the fifth.

Q. Do you do anything besides elevator work now?

A. Yes, I watch on Saturdays, and on Sundays, one Saturday a month I watch, and then one Sunday a month.

Q. What time Saturday?

A. Well, if I am on a Saturday watching it is from three till five.

Q. And on Sunday, watching?
A. On Sunday it is from seven till five.
Q. What do you do when you are watching?
A. Have to walk through the building and ring clocks.
Q. Where are those clocks?
A. On the different floors, clocks on every floor.
Q. What position on the floor?

THE COURT: Well, now, would you advise me as to the theory on which that is material, what position the watchman's clocks are on the floor?

MR. VOTAW: Well, I didn't want to ask him whether they were inside the premises of the tenants. I thought I could get at that by asking him a non-leading question.

THE COURT: I know, but then what?

MR. VOTAW: I want to develop that he had to go through the tenants' premises and watch the whole premises, not only just in the hallways.

THE COURT: Well, why don't you ask him?

By THE COURT:

Q. Do you watch tenants' premises as well as the hallways?
A. Yes, I go right through the floor where they are at.
Q. All right.
A. One at each end, a clock at each end.

THE COURT: All right.

By MR. VOTAW:

Q. Do you have to watch for windows that are open?
A. Oh, yes.
Q. Radiators that leak?
A. Yes.

By THE COURT:

Q. Well, you do whatever a watchman does?
A. Yes.

THE COURT: We all know what that is.

MR. MASON: In fact, he has been there so long he does it well.

By MR. VOTAW:

Q. Just what is it that a watchman does? That is just what we are trying to find out. Just what is it that a watchman does?

THE COURT: Well, I know what a watchman does. Don't go into that. So does the Supreme Court.

MR. MASON: Maybe some of those that will be there when this case gets there won't know what a watchman does.

THE COURT: All right.

MR. VOTAW: Cross-examine.

MR. MASON: No questions.

HARRY GALLAGHER, having been duly sworn, was examined and testified as follows (Tr. pp. 93-100 incl.):

Direct-examination.

* * * (Tr. p. 93):

By MR. VOTAW:

Q. Mr. Gallagher, you are employed by the defendant in this case?
A. Yes.
Q. A. B. Kirschbaum Company?

A. I am.

Q. How long have you been employed by them?

A. Since 1934.

Q. During the latter part of 1938 and first part of 1939 what was your employment?

A. Well, was a porter.

Q. Porter?

A. Yes.

Q. Now, as porter what did you do?

A. I attended to all the toilets—lavatories, I meant to say—clean windows, and watch, when the watchman was off I took his place, once a month.

Q. Once a month?

A. Yes, and then I work in his place when he is off at night, or, for weeks, I worked ninety-eight hours a week.

Q. Now, did you have anything to do with the elevators at that time?

A. Oh, yes, I was working on the elevator, only relief man.

Q. I see. What did that work consist of?

A. Why, from twelve o'clock to one-thirty.

Q. And what did you do from twelve to one-thirty?

A. Relieving the man to go to lunch.

Q. Just on one elevator?

A. No, three of them.

Q. I see, half an hour on each?

A. Half an hour on each, yes, sir.

Q. And what has been your employment since the latter part of 1939?

A. Well, I done watching for—and I run the elevator.

Q. You run the elevator. Which elevator do you run now?

A. The Carpenter Street elevator, passenger.

Q. The passenger elevator at Carpenter Street. That is what you have been doing now?

A. Yes, sir.

Q. And what type of passengers ride on those elevators?

A. Just the employees, and there are salesmen.

Q. Employees and salesmen; employees of whom?

A. Of the different ones in the building.

Q. Of the different ones in the building. Are there any customers, also?

A. Why, yes, people comes up to D'Alonzo's, after suits, and brings them down.

Q. And the tenants themselves, I suppose—

A. Yes, the tenants.

Q. —use the elevators. Now, how frequent is the use of those elevators?

A. Oh, I am up and down every—every second, I guess.

Q. Up and down all the time?

A. All the time.

Q. Are there any particular rush hours?

A. Well, around twelve o'clock, in the mornings, and in the nights, coming out.

Q. Then you have the freight elevator alongside of you to help?

A. Yes, sir.

Q. Are you able to take them up and down as fast as they congregate?

A. Well, they time me in about a minute or minute and a half.

Q. Now, do you go to all the floors at these rush periods?

A. Well, sometimes I go past floors, if I don't have nobody to go off the floor.

Q. Is there any rule about floors which can use the elevators?

A. What?

Q. Is there any rule about the floors which may use the elevators?

A. Well, the fifth floor, the sixth floor and all the floors can use them.

Q. Can the employees on the first three floors use the elevators?

A. Well, no, sir.

Q. They can't? Why not?

A. Well, the only ones use it is pinkers, going upstairs, that is the only one that uses the elevator.

Q. Well, why is that?

A. They go up to D'Alonzo to get the stuff made up, they take clothes up there.

MR. MASON: I can't quite hear you. Will you lift your voice a little bit?

THE WITNESS: I say, they take clothes upstairs to be made.

MR. MASON: I didn't get that. What was that?

THE COURT: Take clothes upstairs.

THE WITNESS: Yes, the pinkers takes clothes upstairs.

THE COURT: "The pinkers takes clothes upstairs."

MR. MASON: I see.

THE WITNESS: Up at D'Alonzo's.

MR. MASON: I thought it was something important.

THE WITNESS: No.

By MR. VOTAW:

Q. Was there any period when the elevators were closed down, that you remember?

A. Only, when they pack them and put the gates on, that is all.

Q. When they pack them and when they were putting the gates on?

A. No, I said when they was packing it and put the gates on.

Q. Yes.

A. Safety gates.

Q. Yes. Did you ever have to do any extra elevator work for the tenants?

A. Yes, I work on Saturday afternoon after three o'clock for the Progressive Clothing Company.

Q. Is that regularly every Saturday or only occasionally?

A. No, two Saturdays in a month?

Q. Two Saturdays in a month?

By The Court:

Q. They pay you for that?

A. Yes, sir.

By Mr. Votaw:

Q. What type freight goes up these elevators and down?

A. Well, I don't take no freight up on my car, I have passengers.

Q. You don't on your car?

A. I just run the passengers.

Q. When you were acting as relief elevator operator, in the early part of 1939, on the freight elevators, at noon time, was much freight going up and down then?

A. Well, every once in a while, I would go up and down with a package, or, say, for the third floor, lining, they put that on a truck and took it upstairs.

Q. And what type packages would they be?

A. Well, just bundles they put on the truck and push it on the elevator and take it upstairs, and push it off.

Cross-examination.

By Mr. Mason:

Q. I just want to be correct, Mr. Gallagher. As I

understood your answer to counsel's question, it was that on Saturday afternoon—

A. Yes, sir.

Q. —you frequently work overtime for the tenants?

A. Yes, for the Progressive, yes.

Q. And they pay you?

A. Yes.

By The Court:

Q. Twice a month?

A. Well, I work on Sunday, and I do Saturdays in between that.

By Mr. Mason:

Q. Then sometimes during the week days after your regular work is done you work also for some of the tenants, do you not, sometimes?

A. I work for D'Alonzo, about an hour or so.

Q. Yes.

A. Two hours.

Q. And he pays you for that?

A. Yes, sir.

Mr. Mason: That is all.

Mr. Votaw: That is all.

Samuel H. Fleming, having been duly sworn, was examined and testified as follows (Tr. pp. 100-109 incl.):

Direct-examination.

Mr. Mason: You are calling the plaintiff for cross-examination?

Mr. Brodie: No, this is not the plaintiff.

By Mr. Brodie:

Q. Where do you live, Mr. Fleming?
A. 2424 South Watts Street.
Q. Where are you employed?

By The Court:

Q. Where are you employed, he says.

By Mr. Brodie:

Q. Where are you employed?
A. I am employed with A. J. Holman, now, 1224 Arch Street.
Q. Have you ever worked for A. B. Kirschbaum Company, the defendant in this case?
A. Yes, sir.
Q. Between what periods did you work?
A. I went to work for the--
Q. Defendant.
A. I went to work in the year of May 20, 1933.
Q. And how long did you work for the defendant? When did you quit?
A. I quit December 13, 1929.
Q. 192—you started in 1933?
A. Or 1939, rather.
Q. And what job did you have?
A. I was watchman.
Q. As watchman what were your duties?
A. Well, my duties, from five to seven, I was to stand in the yard.
Q. From five to seven in the morning?
A. In the evening.
Q. Or, in the evening.
A. In the evening.
Q. You came to work at five P. M.?
A. That is right.
Q. I see.

A. At 5 P. M. to seven I stood in the yard, I took all packages off the people coming out of the building, and also watched that no strangers came in the building.

Q. Well, just a moment, what do you mean by, you took all packages off people?

A. Passes, passes.

Q. Oh, passes?

A. Yes, see, when they came downstairs with a pass and a package I had to take the pass off of them.

By The Court:

Q. Permission to take the package out, is that what you mean?

A. Yes.

Q. It was something that allowed them to take packages out?

A. Yes.

Q. If they didn't have the permission you took away the package?

A. That is right.

The Court: All right.

By Mr. Brodie:

Q. All right, what else did you do at the gate?

A. Well, then I waited for the trucks to all get out of the yard.

Q. What kind of trucks?

A. Well, they were delivery trucks. Some were delivering goods and some was taking some goods out.

Q. Do you know to where they were making deliveries and from where they were taking goods out?

A. No, I couldn't tell you that.

By The Court:

Q. Well, large numbers of them were engaged in interstate commerce, weren't they?

A. That is right.

MR. BRODIE: Thank you, sir.

MR. MASON: If he knows what interstate commerce is—

THE COURT: Oh, all right.

MR. MASON: —he is a grand witness.

THE COURT: That is all right, surely.

By MR. BRODIE:

Q. Go ahead, what else did you do?
A. When the yard got empty, I closed the gate.
Q. Yes.
A. And by that time I had to start on my round.
Q. What did your round consist of?
A. Well, my round consisted of, when I went on the first floor, up through the building, I used to have to pull down and shut all the windows, I used to have to walk the fire tower.
Q. What else?
A. Take care of the toilets.
Q. What else?

By MR. MASON:

Q. What was that last? I didn't get that, take care of what?

THE COURT: Toilets.

A. Take care of the toilets.

By MR. MASON:

Q. Take care of the toilets?
A. Yes, sir.

By MR. BRODIE:

Q. What else?

By Mr. Mason:

Q. That is, the building toilets?

A. That is the building toilets, yes.

* * * (Tr. pp. 104, 105):

By Mr. Brodie:

Q. Proceed, Mr. Fleming.

A. Well, I took care of all the toilets in the building, and then I had to take care of all the pressing machines and the irons on the first floor.

Q. What do you mean when you say you had to take care of all the pressing machines and the irons?

A. Well, I had to see that there was no leaks, that the machine was—if the machine was shut down I had to see that it was shut down right.

Q. And these machines to which you refer, were they in the parts of the building—

A. That is right.

Q. —that the tenants occupied?

A. That is right, tenants, on the tenants' floor.

Q. And what did you do when you looked for leaks?

A. Well, I looked around the machine. If I seen any water, if the water was all over the floor, I would have to get down and wipe that water up and put a bucket underneath that machine.

Q. And what else did you do about leaks?

A. Well, if the leak got beyond my control I would have to shut the machine off.

Q. And what else was included in your rounds?

A. Then I would have to walk the fire tower down to see that there was no cigarette butts lit, close all the windows in the fire tower, then I would have to go downstairs, when I completed my round, I would have to go downstairs and let the people out.

Q. Let what people out?

A. The people that were working in the building.

Q. Could they not get out if you weren't there?

A. No, sir, they couldn't get out unless I left them out, because I had the keys in my possession.

Q. Did you have any other duties?

A. Well, I used to have to—I have two firemen work there, one man worked from four to twelve—I think that is what he worked, from four to twelve. The other man worked from twelve to eight.

Q. Did you have anything to do with the heat?

A. Yes, I had to turn the heat on in the morning, four-thirty, five o'clock, something like that, for the—for the tenants up through the building. I had—

Q. Where did you turn the heat on?

A. Down in the boiler room, and then up through the building, I had to turn it on, so many valves on each floor.

Q. How frequently did you make these rounds that you have described?

A. Every hour.

Q. Did that give you any time for leisure, or were you busy all the time?

A. Oh, I was—well, it took me approximately, I would say, forty-five, sometimes fifty minutes, to go through that building.

Q. During the hours when you were working as night watchman did you ever receive any packages?

A. Occasionally, yes, sir.

Q. For whom?

A. Well, I received for Tony Marino and for Mr.—

Q. Who was Tony Marino?

A. He was on the first floor. He isn't there now, I don't think.

Q. For whom else did you receive packages?

A. D'Alonzo.

Q. On what floor is he?

A. He is on the sixth.

Q. What did you do with those packages?

A. Well, I took Mr. D'Alonzo's up and put the package on his desk, and I took Tony Marino's merchandise and put it in his room.

MR. BRODIE: Well, subject to the Court's ruling regarding these witnesses' wages and hours I have no further questions.

THE COURT: Yes, all right.

MR. BRODIE: Cross-examine.

MR. MASON: No questions.

THE COURT: We will recess until two o'clock, then.

(Recess, 12.30 until 2 o'clock P. M.)

AFTER RECESS.

Present: Counsel as before noted.

PLAINTIFF'S EVIDENCE (Continued).

GEORGE EPPS, having been duly sworn, was examined and testified as follows (Tr. pp. 109-120 incl.):

Direct-examination.

By MR. VOTAW:

Q. Now, Mr. Epps, will you please speak up so that we can all hear you?

A. All right.

Q. You are employed by A. B. Kirschbaum Company?

A. Yes.

Q. How long have you been employed by them?

A. About ten or eleven years.

Q. And what is your job?

A. Elevator. Elevator.

Q. You operate an elevator?

A. Yes.

Q. Which one of the elevators do you operate?

A. The back elevator, freight.

Q. That is one on the Carpenter Street side?

A. Carpenter Street—Washington Avenue side.

Q. Washington Avenue side, that is my error. Do you do anything but operate the elevator?

A. Well, carry passengers, bring down trucks of dirt, and clean up the yard, and all.

Q. When do you clean up the yard?

A. On Saturdays, after—in the mornings, first thing in the morning.

Q. Saturday, in the morning?

A. Yes.

Q. Now, what do you do Saturday afternoons?

A. Watch the building Satu.day afternoons.

Q. You watch the building Saturday afternoons. Do you ever have any other watching?

A. On Sundays, every third Sunday.

Q. Every third Sunday. And what goes up and down on the elevator?

A. Cases of goods, all like that, coats, going out.

Q. How do the coats go out?

A. Some goes out on racks.

Q. Some go out on racks. Do you have any cleaning work to do besides sweeping the yards?

A. No, I hardly do any cleaning, only bale up paper during the time I run the elevator, in my spare time.

Q. Oh, in your spare time you bale paper?

A. Yes.

Q. Where does that paper come from?

A. Different floors, from each of the tenants on the floor.

Q. How do you get it?

A. They push it to the elevator, and I carry it down on the car, pull it in and carry it down.

Q. Down where?

A. To the basement.

Q. I see, and then you bale?

A. Yes, sir.

Q. Do you have to sort it?

A. Yes, I have to sort it.

Q. And what type packages come in and out on the elevator?

A. Well, some comes in cases. I don't know what is in them.

Q. Yes, who puts them on the elevator?

A. People who brings them there and those who receive them, they generally put them on.

Q. The receiver—

THE COURT: Well, gentlemen, may I ask, is it admitted that these cases the witness is now referring to, in many if not all instances, contain goods which have been or will be transported in interstate commerce?

MR. MASON: We couldn't admit it, sir, in reference to any particular witness.

THE COURT: All right.

MR. MASON: We have admitted as far as we can admit,—

THE COURT: All right, go ahead.

MR. MASON: —under the facts as we know them.

THE COURT: Well, all right.

MR. MASON: You see, we don't know that.

THE COURT: I thought I might be able to simplify that.

By MR. VOTAW:

Q. The truck driver then goes up with the freight?

A. Right.

Q. Or comes down with the freight?

A. Yes.

Q. Do you ever have to carry any freight just between floors in the building?

A. Yes, the Progressive.

Q. And what floors are these?

A. Third and fourth.

Q. Third and fourth?

A. Yes.

Q. Third and fourth, and does that occur regularly or just infrequently?

A. Well, mostly pretty regularly, on account of that Army contract they have.

Q. I see. What kind of material is that?

A. That is like war uniforms.

Q. I see. You mentioned clothing on racks. What tenant is that from?

A. That is from Feldman's.

Q. Feldman's?

A. And D'Alonzo.

Q. How many coats would be on a rack?

A. From twenty-five to fifty.

Q. Twenty-five to fifty, and where do the trucks unload to come into the building?

A. In the rear of the building, at the platform.

Q. Is that an enclosed platform?

A. No, it is an open platform.

Q. Open platform. Can you describe these racks that you speak of?

A. Yes, according to the ordef, like that one coats are hanging up on, only with wheels at the bottom.

(The witness indicated a rack in the court room.)

By Mr. Votaw:

Q. Wheels at the bottom?

A. Yes.

Q. Would they be as big as that one, as long as that one?

A. Well, they would be as long as that one.

Q. Could they be carried up and downstairs?

A. No, they couldn't be carried up.

Q. What time of the day do you carry passengers?

A. From seven-thirty up until near nine-thirty. Then I—

Q. In the morning?

A. Yes, in the morning, and then from twelve until one, at noon, and from five until I get them down at night.

Q. I see. Is there a rush of passengers at that time?

A. Yes.

Q. Who are those passengers?

A. They are employees of the building, on the fourth fioor and the fifth.

Q. Employees on the fourth and the fifth, and they keep you busy during those times?

A. Yes.

Q. Taking them out and in?

A. Yes.

Q. During those times can you carry any freight?

A. No, not then.

Q. Cannot?

A. Can't carry freight.

Q. Why not?

A. The car is loaded with people, so I make the freight wait.

Q. How much of this trash do you take down?

A. I take down a bit—a good bit of it from the fifth floor, at the most, from the fifth.

Q. You said you took it in trucks?

A. Trucks, and then bundles of paper, too.

Q. What is the size of these trucks?

A. They are a good size.

Q. About as high as this table, or higher?

A. Higher than that.

Q. Higher than that table?

A. Yes.

Q. Are they as big around, as big as the table?

A. Not as big as the table, but I would say half way.

Q. About half the size of the table?

A. Yes.

Q. And how many would you take down a day from the fifth floor.

A. Sometimes five and six trucks off of there a day.

Q. And you take those down in the basement?

A. Yes.

Q. And sort them?

A. Sort them.

Q. Do you have to run the elevator at the same time?

A. Same time.

MR. MASON: Well, now, wait a minute, you don't mean that, Mr. Votaw.

MR. VOTAW: Well, in between time.

MR. MASON: Well, you have asked the witness—I don't object to leading questions that are not unfair to the witness, but he doesn't sort this stuff in the elevator.

MR. VOTAW: I don't suppose so.

THE WITNESS: You have to—

MR. MASON: He isn't running the elevator at the same time he is sorting stuff. That was your question, and I hope you didn't mean it, because I am sure he does not.

By The Court:

Q. You don't, do you?

A. No.

By Mr. Votaw:

Q. You have to sort the stuff in between elevator trips?

A. Trips.

Q. And during the same period during which you are on the elevator?

A. Yes.

Q. What would happen if you didn't remove this trash?

A. Well, it could block up the fire escape or—

By Mr. Mason:

Q. What is that? I can't hear that.

The Court: It could block up the fire escape.

A. (Continued) Fire escape, or either start a fire if it lays around that way.

The Court: It could block up the fire escape or start a fire if it lays around that way.

Mr. Mason: Well, that is interesting, but I can't see just how this witness could give us any real answer to that question in the form he has given it. If Mr. Votaw wants to go ahead and explore it a little further—we don't know yet that this stuff was at the fire escape when he gets it.

The Witness: They put it in front of the elevator door and blocks it, and as I have got freight coming up and down, sometimes they have to wait until I get my spare time to go up to get it.

By Mr. Votaw:

Q. Where is the fire escape entrance with relation to the front of the elevator?

A. That is on the side.

Q. It is right on the side by the elevator?

A. Yes.

Mr. Votaw: Cross-examine.

Cross-examination.

By Mr. Mason:

Q. I am a little curious about this trash. You have aroused my curiosity, Mr. Epps. Is the trash you speak of trash that accumulates in the course of the day in various tenants' rooms where the work is going on?

A. Well, some of them tell me, they even take it down there, so much of it, and I am jammed up, I can't even handle it all at the same time, some of it has to stay up on the floor.

Q. That is, they want you to do it sometimes when you just can't do it, isn't that so?

A. I try to do all I can during that time.

Q. Yes.

A. But I can't do but one man's job.

Q. Well, now, the trash is something that is ordinarily cleaned up in the building, isn't it?

A. Yes.

Q. That is what you are talking about, and who cleans it up in the tenant's place, the tenant?

A. No, they have a porter there who sweeps the floor.

Q. What?

A. They have a porter who sweeps the floors.

Q. That is, the tenant does?

A. Yes.

Q. And he sweeps up the floor and the trash is col-

lected up, and then it is put together in a pile, or in a bale, as you call it, and carried down in the elevator as soon as you get a chance to take it down to the basement, where it is sorted out?

A. Yes.

Q. Is that correct. And it is composed of all sorts of stuff, is that right?

A. Yes.

Q. Newspapers and all kinds of things, and that is the reason you have to sort it out?

A. Yes.

Q. Mr. Epps, as I understand it, the tenants put this trash, we will call it, in the trucks, and you take the trucks down on the elevator?

A. Fellow sweeps up the floor, he puts it in the truck.

Q. He puts it in the truck?

A. He pushes it near the elevator.

Q. Yes.

A. And I pulls it on and takes it downstairs.

Q. That is it, and then when it gets down in the cellar you are one of those that helps to sort it out?

A. Yes.

Mr. Mason: Well, that satisfies my curiosity. That is all, thank you.

Mr. Votaw: That is all.

Nick Cattelise, having been duly sworn, was examined and testified as follows (Tr. pp. 120-126 incl.):

Direct-examination.

By Mr. Brodie:

Q. Where do you live?

A. 1221 Kimball. That is between Washington Avenue and Carpenter Street, on 12th Street.

Q. You are employed by A. B. Kirschbaum Company, the defendant in this case?

A. Yes.

Q. How long have you been employed by the Kirschbaum Company?

A. Why, 1940, 1940.

Q. What month?

A. The third of January.

Q. Where do you work?

A. Why, I am watching.

Q. Do you work at the Kirschbaum Building at Broad and Carpenter Streets?

A. Yes.

Q. What is your job?

A. Watchman.

Q. Day or night?

A. Why, I am going on twelve o'clock until seven in the morning.

Q. Twelve o'clock midnight until seven in the morning?

A. Yes, sir.

* * * (Tr. pp. 121-123 incl.).

Q. Your last statement, then, is that you are a night watchman?

A. Yes.

Q. Will you please describe for the Court just what your duties as night watchman consist of? What do you do?

A. What I do?

Q. Yes.

A. Why, when I start my time, going up the stairs and ring the clock, and go through the floor, and watch the windows, and watch all the pressing, go around the building, and if any leak, everything is O. K., I let them go and don't bother.

By The Court:

Q. Now, you say you go through the floor; do you go in all the rooms?

A. Yes, every room, every floor, I got to go every hour in the floor.

Q. All right.

A. And ring two clocks every floor.

By Mr. Brodie:

Q. Do you close windows if they are open?

A. If they are open I have to close.

Q. If there are any lights lighted in tenant's premises—

A. If there is any light is on, I put it out.

Q. What do you do about leaks in the pressing machines and other steam facilities?

A. Why, if there is a leak, why, I have to try to stop it.

Q. Do you do—

A. The best I can.

Q. Do you do anything about guarding against fires?

A. Well, I have to tend sprinklers, in case any go, I have to shut the valve, on my time.

Q. What valve?

A. I mean, if there is any water going down on the floor, I have to find out the valve it is on, to shut it off.

Q. Yes, but do you do anything about guarding against fires?

A. Well, at the present time ain't had no fires. In case we had any fires we have to put something on it.

Q. I am sorry, I didn't get the last part of your answer.

A. You can't wait until somebody else comes in.

The Court: Got to jump on it if you have a fire; well, part of your job is to look out for fires, is it?

The Witness: Well, I have to look in case of a fire.

THE COURT: All right.

By MR. BRODIE:

Q. Do you have anything to do with the turning on of the heat in the cold weather?

A. Well, I look around the valve, if any valve is shut, I have to open. If he is on, I don't bother.

Q. And do you ever stand guard at the gate?

A. Well, when I come in, my time in the evening.

Q. What time?

A. Five o'clock.

Q. At the gate.

A. Well, I watch the trucks go out, and that the peoples come up, from up the stairs, watch for any package, take them out, if they got any pass, then I take the pass, if not, take the package back.

Q. Have you been doing that same work regularly ever since you started to work—

A. Yes.

Q. —for the Kirschbaum Company?

A. Since I started that job, I do my duty.

MR. BRODIE: You may cross-examine.

MR. MASON: No questions.

MR. BRODIE: That is all, thank you.

MCKINLEY EDWARDS, having been duly sworn, was examined and testified as follows (Tr. pp. 126-137 incl.):

Direct-examination.

By MR. BRODIE:

Q. Where do you live, Mr. Edwards?

A. 806 South 15th Street.

Q. You are employed by A. B. Kirschbaum Company, the defendant in this case?

A. Yes.

Q. How long have you been employed there?

A. Twenty-one years the 15th of September past.

Q. Doing what?

A. Fireman.

Q. Have you been fireman all twenty-one years.

A. Yes.

* * * (Tr. pp. 126-128 incl.)

Q. What do you do now? Do you have more or less work?

A. I have more.

Q. And what in addition do you do?

A. Well, now, I will tell you just what I have to do. When the engineer goes out, I will start there, first, when the engineer goes out, up through the building, to the tenants, to do jobs, I have to do his work, and that is watch the engine, oil it, oil the pumps, watch and keep it from running hot until he comes back. Then I have to pass my own coal, I have to unload coal cars. If I run short of coal down in the boiler room I got to go down to Washington Avenue and wheel it up and dump it in the coal car and throw it up, and when he fixes a pump I have to give him a hand, if he wants it.

Q. What pumps?

A. Well, the one is the house pump, that starts water up on the roof of the building, one is the boiler feed pump, one is the sewer pump, one is the vacuum pump, the fire pump, they don't run that much, and the elevator pump.

Q. Do you know for what purposes the steam that is generated in these boilers you fire is used?

A. Well, they presses with it, they sponges with it. That is about as far as I know.

Q. Who are "they"?

A. And they run the dynamo with it.

Q. Who are "they"?

A. Well, all of them presses.

By The Court:

Q. Who are they, when you say "they", who do you mean?

By Mr. Brodie:

Q. Who do you mean?
A. Why, D'Alonzo,—
Q. You mean the tenants in the building?
A. Yes, the tenants, yes.
Q. All of them use the steam?
A. Yes.

By The Court:

Q. Do they all use the steam?
A. Yes.
Q. All right.
A. They all use the steam.

By Mr. Brodie:

Q. How many of them use the steam for sponging, do you know?
A. There is two, as far as I know.

* * * (Tr. pp. 129, 130.)

Q. Is the steam which is generated in these boilers that you fire used for running the elevators?
A. Oh, yes.
Q. Is it used to supply heat to the premises?
A. Oh, yes.
Q. Do you know whether it runs the generators which generate the electricity which lights the building?
A. Oh, yes.

* * * (Tr. p. 130.)

Q. How many boilers do you fire?
A. Why, I fire two.

Q. And how many engines do you watch?

A. One.

Q. Is there anybody else who does work of a similar nature to yours?

A. Why, not at the same time that I does. After I get off, there is another man comes on.

Q. Who is that?

A. Why, that is a man by the name of Mr. Rocca.

Q. Is there any other fireman?

A. Yes, there is one comes on after he goes off, at twelve o'clock at night. His name is Pete Rocks.

Q. Does he do the same kind of work as you?

A. Well, not the engine, he don't do that, because that isn't running.

Q. How about work as a fireman?

A. He has to do everything I do, and watch the pumps.

Q. And Rocca does the same, too?

A. Yes, and he has to watch the engine, Rocca does, because he comes on at four o'clock, until it is shut down.

Q. And what time does the engine shut down?

A. Why, I was told here some time ago it is supposed to have been shut down at quarter after five.

Q. What engine are you referring to?

A. The one—

Q. The one that generates the electricity?

A. The ones that generates the electric.

Q. Do you know to whom electricity is supplied by the building?

A. Well, I know a couple, I won't say that I know them all, to be sure, but I do know a couple.

Q. Who are they?

A. Why, one is Mr. D'Alonzo.

Q. Yes.

A. And the other are Spivaks. One is on the sixth and one is on the second. Now, any other, I don't know of any other that uses the electric. If there are any, I don't know of any.

Q. At what pressure is steam maintained?

A. Why, I carries ninety pounds.

Q. Do you ever get any complaints from any of the tenants—

A. No.

Q. —regarding the steam?

A. No, not often; once in a great while.

Q. Do you ever?

A. Yes, once in a while.

Q. What are those, what is the nature, generally,—

A. Why, they comes down—

Q. —of those complaints?

A. Why, they comes down and says wet steam.

Q. Yes, what do you mean by wet steam?

A. Why, see, why, sometimes when I let the steam go down, or when the steam goes down, it is wet, it is damp, it isn't dry, see what I mean?

Q. Yes.

A. It wets the goods, but then all the time it isn't my fault, it is their fault, their traps—

Q. I haven't blamed you for it.

A. But I am just only telling you.

Q. I am just trying to find out what is the objection to wet steam.

By The Court:

Q. Why don't they like to have wet steam?

A. Why, that wets the goods and they don't press right, see?

Q. All right.

A. After they press, it wrinkles.

The Court: All right.

By Mr. Brodie:

Q. How do you keep track, or what method have you for knowing how much steam pressure you have?

A. Why, I have a gauge to watch.

Q. And do you have to watch that gauge fairly constantly to see that the steam is kept up?

A. Oh, yes.

Q. To the pressure?

A. Yes, sir.

Q. Does anybody else also look out for the gauge?

A. Why, when I step out the boiler room, I tells the engineer when I go out, and then he watches it, like if I go to the wash room, I always tell him.

MR. BRODIE: No further questions.

Cross-examination.

By MR. MASON:

Q. Edwards, as I understood it, you were a fireman—

A. Yes.

Q. —at this time, and your duties required you to be down where the engines and the boilers are?

A. Where the boilers are.

Q. Yes.

A. Not where the engines are.

Q. Yes. Do you have any duties at all that take you outside of the boiler room?

A. Oh, yes.

Q. And what duties are those?

A. Oh, that is going in the engine room to take care of the engine, when the engineer is out, that is to go down in the yard and wheel coal up, so I can fire the boilers.

Q. Yes. Now, what duties do you have as a fireman that requires you to go upstairs into the tenants' place of manufacture?

A. I don't go up there.

Q. Well, you told Mr. Brodie that you knew that they used the steam up there in their various machines. Did you ever go up and see it?

A. I have gone up, when I used to, when Kirschbaum ran it, I used to go up there.

Q. What?

A. When Kirschbaum was running it I used to go up there. I don't go up there now.

Q. No, but you told him that all the tenants, that you guess that all the tenants used this steam up in their various places?

A. Yes.

Q. Now, you didn't mean that, did you?

A. Yes, I mean they used it.

Q. Well, have you been there yourself to see it?

A. Up there? I know they use it because they have pressing machines up there.

Q. Have you ever been up there?

A. Not while they was operating, no, not while they was operating.

Q. You have never been up there at all?

A. Not while they was operating.

Q. And you have never been up there in the tenants' places in the building to see what they do with electricity, either, have you?

A. Oh, no, not while they was working.

Q. So that you—

A. Not while they was working.

Q. So you didn't mean to convey the impression which your answer did to Mr. Brodie, that you personally had been up there seeing them operate?

A. No, I didn't, personally, I didn't go up.

MR. MASON: That is all, I think, that is all.

Re-direct-examination.

By MR. BRODIE:

Q. Have you ever been up in the tenants' premises when they were not working?

A. When they were not working?

Q. Yes.

A. Yes.

Q. Have you seen pressing machines there?

A. Yes.

Q. Do you know, Mr. Edwards, how the steam is supplied to the upper floors of the building from the boilers?

A. Yes, it has got a six-inch main, I think—I won't be sure it is a six-inch—to all the way to the roof.

Q. Yes.

A. And it branches off on a six-inch main from the boiler room all the way to the roof, and then a smaller pipe branches off, goes to the different tenants.

Q. Smaller pipes branch off the line to go to the different tenants, you say?

A. Yes, from the six-inch main.

Q. And do you know what connections are made between the pipes and the pressing machines?

A. No, I really don't know just what connection that is.

Mr. Brodie: That is all.

Mr. Mason: No questions.

Charles Moetsch, having been duly sworn, was examined and testified as follows (Tr. pp. 137-152 inc.):

Direct-examination.

By Mr. Brodie:

Q. Where do you live, Mr. Moetsch?

A. 2529 South 17th.

Q. Are you employed by A. B. Kirschbaum Company, the defendant in this case?

A. Yes, sir.

Q. How long have you been employed by A. B. Kirschbaum Company?

A. Next April, twenty-five years.

Q. At the present time what is your job?

A. I am supposed to be superintendent and chief engineer.

Q. Well, are you, actually?

A. Yes.

Q. How long have you been superintendent and chief engineer?

A. I was chief engineer for the time being that I am in Kirschbaums, and twelve years I am superintendent.

Q. And under you do all the building employees work? That is rather an inverted sentence; do all the building employees work under you?

A. I have got twelve men working under me, yes.

Q. What are their jobs? Describe them by jobs.

By The Court:

Q. Twelve, is that?

Mr. Brodie: Twelve.

A. Three elevator fellows.

By Mr. Brodie:

Q. Yes.

A. Three firemen.

Q. Yes.

A. Two watchmen.

Q. Yes.

A. One engineer, a utility man.

Q. Yes.

A. One carpenter.

Q. Yes.

A. One helper.

Q. And one what?

A. Helper, carpenter helper.

Q. Is that twelve?

A. Oh, and one more, porter.

Q. One?

A. A porter.

Q. Oh, thank you.

A. Cleaner. That is twelve.

Q. How long has it been, Mr. Moetsch, that A. B. Kirschbaum Company has not operated a clothing factory in these premises?

A. '28, I believe, since 1928 we stopped.

* * * (Tr. pp. 139-141 inc.)

Q. Will you describe briefly the functions performed by each of the classes of employees that you have mentioned?

A. For instance, how the firemen—

Q. What do the elevator operators do?

A. They run the elevator up and down and take the pasengers off.

Q. Do they carry freight, too?

A. Yes.

Q. And how about the firemen?

A. The firemen fires the boilers and keep up their steam.

Q. At what pressure is the steam kept?

A. Between ninety and a hundred. It daren't go below eighty.

Q. Why not?

A. That is on account of the pressing machines, and the steam gets wet after it goes below eighty pounds. Between sixty and eighty the steam is wet.

Q. Yes.

A. And if it goes above eighty it is too dry. Now, eighty pounds is supposed to be on the pressing machines.

Q. How many pressing machines are there in the building to which steam is supplied, do you know?

A. Oh, I guess about a hundred.

Q. Is steam supplied for any other machines?

A. For—yes, for one sponging machine.

Q. Whose is that?

A. And several irons, what we call steam irons.

Q. Are the steam irons hand operated?

A. Yes.

Q. Or are they rather large machines operated by foot power?

A. They are—some of the irons is handled by foot power as well as by hand, you have to handle it by your hand, and put your foot on the pedal, if you want to put pressure on.

Q. I see. Now, how about the sponging machine, do you know just what the function of the sponging machine is?

A. Yes, sir, I have been with a good many of them.

Q. All right, will you please describe it to the Court?

A. Sure. The cloth comes in the factory and goes over the machine, over a roller, and the steam gets turned on, then it goes over the top, then another sponger, steam roller, then it goes on the outer side over another roller and there is steam on. Is that plain enough?

Q. Yes, and just what happens to the cloth as it passes over these rollers?

A. It shrinks. That is the idea of shrinking cloth.

Q. I see, so that, if I understand you correctly, what you are telling me is that the cloth cannot be cut and sold into garments until it is shrunk in this sponging machine, is that so?

A. I didn't say that.

Q. Well, is that so?

A. If you are going to have a suit that isn't shrunk, understand, you go in the rain and you are going to shrink.

Q. I see. Can the sponging machine be operated without the steam?

A. No.

Q. Now, these various persons—

A. Understand, pardon me one moment, there is dif-

ferent sponging machines, not only steam sponging machines.

Q. All right, I am talking about the one—

A. Oh.

Q. —in the building.

A. Yes.

Q. Can that be operated without steam?

A. No.

Q. Can the pressing machines which are in the building be operated without steam?

A. Why, all depends if the tenants—if they want to get their steam off us or not, then they have to make it themselves.

Q. But steam is essential for the operation of the pressing machines, is it?

A. Yes.

Q. Now, this same steam which is generated in the boilers, I understand, operates the elevators, too?

A. Yes, it operates the pump.

Q. Which operates the pump?

A. Which puts pressure on the water, it is hydraulic elevators, builds up the pressure, and this pressure carries the elevators up and down.

Q. Is it true, then, that if the steam were to fail the elevators would fail and the pressing machines would fail?

A. Yes, that all depends if the steam goes down below fifty pounds.

Q. Yes.

A. Then it would slack up.

Q. What would slack up?

A. The pump would slack up.

Q. The elevator pump?

A. The elevator pump, yes.

Q. And there wouldn't be sufficient pressure to operate the hydraulic elevator?

A. Yes.

Q. Is that so? Electricity, I understand, is also generated in that building, is that true?

A. Yes, a little bit.

Q. And that is done by dynamos down in the basement?

A. Yes.

Q. That electricity, is it direct or alternating current?

A. Direct.

Q. Do you know whether any of the motors in the building are operated on this direct current?

A. Yes, sir.

Q. Whose?

A. D'Alonzo Lancaster, three motors.

Q. Any others?

A. And on the second floor is five motors.

Q. Is electricity supplied for any other purpose?

A. We supply the electric to Spivak, on the second floor, and up on the sixth floor for these motors, three motors; few lights.

Q. Electricity is supplied for lights to the sixth floor?

A. Few of them, yes.

Q. How about the second floor?

A. Second floor got the lights and motors.

Q. How about your hallways and the elevators?

A. Sure.

Q. Is that done by outside current or house current?

A. After five o'clock at night we turn on the outside current, but from seven—half past seven in the morning up until five o'clock it uses the D. C. current.

Q. How long—

A. Which we operate.

Q. How long have these—or, how long has electricity been generated in the building?

A. Since the building is in existence.

Q. Have you ever had any complaints about the elevators?

A. What do you mean, complaints?

Q. Well, complaint that the service wasn't good enough, or complaint because an elevator wasn't running on a particular day when a tenant came in to do some work, have you ever had any such complaints?

A. No.

Q. Well, I will refresh your memory. Has Mr. D'-Alonzo ever complained to you about elevators?

A. Not that I know.

Q. Does the building also occasionally do repairs as accommodations for tenants?

A. Once in a while, yes, in the case of emergency we have to do it. Now, if you want me to explain, for instance, a case, I am going to tell you.

Q. Yes, what do you mean by an emergency?

A. All right, an emergency case is, for instance, in Jacob Reed's, on the first floor, there was not so long ago, he had a blowout on a reducing valve, gasket blew out, understand, he didn't know how to shut it off, the people were afraid to work there, and he sent for me.

"All right," I said, "I shut it off, then you are going to send for somebody else to put that gasket in", and I sent then my mechanic up, and he by-passed a reducing trap or reducing valve.

Q. That was on the steam supply line?

A. That was on the steam supply line.

Q. Did you ever do any other repairs around the premises?

A. Oh, yes, once in a while, for instance, in knocking a leg off a table, and they ask me if I would accommodate them, and I said, yes, I do it.

Q. You have a carpenter working there, haven't you?

A. Yes.

Q. What is his name?

A. Eli Gionto.

Q. G-i-o-n-t-o?

A. G-i-a-n-t-o.

Q. Does he makes repairs to windows?

A. Yes, sir.

Q. Does he replace sash chains?

A. Sure.

Q. Sash chains are similar to sash cords, are they?

A. Yes.

Q. Except that they are chains?

A. Yes.

Q. Instead of rope?

A. Yes.

Q. Does he make repairs to doors?

A. Sure, but only doors what belong to the building.

Q. Yes. He also does some painting, doesn't he?

A. Sure, when the floor is empty, for instance, then I put him on painting, if I have no other work for him.

Q. And he paints the common hallways, doesn't he?

A. Sure.

Q. And the staircases?

A. Sure.

MR. BRODIE: You may cross-examine.

Cross-examination.

By MR. MASON:

Q. You spoke of the dynamo in the building generating direct current?

A. Yes.

Q. Do you have any alternating current in the building?

A. Well, for us, yes, for our small—for instance, for the elevator bells and the lights and for the staircases, after five o'clock.

Q. Yes.

A. That belongs to us.

Q. Now, is there alternating current used in the building by any of the tenants?

A. Practically all the tenants got alternating current.

Q. Where did they get that?

A. From the outside, from the Philadelphia Electric.

Q. And there are two of the tenants, however, that still have the old direct current machinery?

A. Yes, during the day time, but if they work overtime, for instance, then they have for the light system, only, they have alternating current.

Q. I see, so that those machines, for instance, in D'Alonzo's place, he has got three of them—

A. Yes.

Q. —that use direct current?

A. Yes.

Q. If he changes those for a different type of machine—

A. No.

Q. —to use alternating—

A. He can't do that.

Q. What is that?

A. He can't do that, he shuts those three motors, they will be shut down until the next morning.

Q. I appreciate that.

A. He can't operate that.

Q. No, but it is only because they are that type of machine?

A. Yes.

Q. Yes, if they were a machine type that carried, that used the alternating current, he would get it from the Philadelphia Electric Company?

A. Sure, he would.

Q. And not from you?

A. No.

Q. Now, then, the electricity which you generate is used for lighting the various portions of the building to be used in common by all the tenants, is that right?

A. Yes.

Q. And you use it in the boiler rooms for lights?

A. Yes.

Q. In the toilet rooms?

A. Yes.

Q. You use it to run your ash machine in the basement?

A. What machine?

Q. Ash machine.

A. Ice machine?

Q. Ash?

A. Oh, ash machine, the ash conveyor, yes.

Q. Yes, ash conveyor?

A. Yes.

Q. All right. What else do you use it for, for the purposes of the building?

A. Well, for lighting—that is about all.

Q. Do you have any—

A. You mentioned it all.

Q. Do you have any carpenter shop work that requires electric current?

A. Oh, yes, we have a circular saw, and we have an iron—emery stone, that is all D. C.

Q. And you use your own current for that?

A. Yes, our current.

Q. Because these are D. C. machines?

A. D. C. machines. We have a drill press, and so forth.

Q. Yes. Is there any one now in the basement?

A. No, the basement is empty.

Q. No tenant in the basement, basement is empty?

A. Yes.

MR. MASON: I have no further questions.

* * * (Tr. pp. 152, 153.)

BEN RASH, having been duly sworn according to law, was examined and testified as follows (Tr. pp. 153-172 inc.):

Direct-examination.

By MR. BRODIE:

Q. Where do you live, Mr. Rash?

A. 5915 Carpenter Street.

Q. And where are you employed?

A. Fishman & Tobin—that is in the Kirschbaum Building, fifth floor.

Q. In what capacity are you employed by Fishman & Tobin?

A. I am general manager.

Q. How long have you been employed by them?

A. Around three years.

Q. Are you familiar with their business and all of its phases?

A. Yes, in general.

Q. What is the business of Fishman & Tobin?

A. We manufacture boys' wash suits.

Q. Out of cotton cloth?

A. Cotton, yes,—wool, curduroy.

Q. Will you describe to the Court just how these wash suits are made by Fishman & Tobin in the Kirschbaum building?

A. Well, we get in the piece goods; they are cut in there, and they are sewed; they are pressed, and that is a finished garment.

Q. Then what happens to the finished garment?

A. That is shipped out to the stores.

Q. Do you know, Mr. Rash, where most of the raw material that you use in making these garments comes from?

A. Well, the majority of it comes from the South.

Q. Do you know what States?

A. We can get it from North Carolina, South Carolina—mostly from North Carolina and South Carolina.

Q. Do you know by what types of carrier the goods comes to Fishman & Tobin?

A. Well, we get it in by boat, by train. There is most any way it could come in—by train—boat—or—

Q. By motor?

A. Motor service.

Q. Motor truck? Motor freight?

A. Yes.

Q. Do you get any by railway express?

A. Very little—yes.

Q. Do you get any by parcel post?

A. Yes.

Q. Are incoming materials brought into the premises of Fishman & Tobin, or are they unloaded by the carrier on the unloading platform down at the street level?

A. They are brought in right onto our floor. Only we sign for them on the floor itself.

Q. Who brings them upstairs?

A. The carrier—whoever brings the goods.

Q. The truck driver or railway express employe, or whoever it may be?

A. Yes.

Q. And how frequently do you get incoming raw materials?

A. Every day.

Q. In what types of containers do those raw materials come?

A. Get them in cases; we get them in bales—maybe small packages sometimes, in just wrapping paper.

Q. When you get them in cases, how large are the cases generally?

A. Rather large—large size cases.

Q. Well, can you give us a more definite idea of the size of the case? Suppose you do it by reference to this table (indicating counsel table).

A. I would say half the size of the table.

Q. Do you have any idea of their weight?

A. Not offhand, no.

Q. Do you know, Mr. Rash, just approximately what percentage of the raw materials that come in to Fishman & Tobin come from points outside the State of Pennsylvania?

A. I should say around ninety per cent.

Q. Fishman & Tobin, you said, were on the fifth floor?

A. That is right.

Q. Do you know whether, Mr. Rash, it would be possible to carry any of these large wooden packing cases upstairs?

A. Carry them?

Q. Carry them up the staircases?

A. No.

By The Court:

Q. You say you don't know, or it would not?

A. I do not think it would be possible to carry those cases up five floors.

The Court: All right; I didn't know what your "no" meant.

By Mr. Brodie:

Q. Is there any regularity in the time at which incoming shipments come to you?

A. No, there is no set time.

Q. They come in at all times during the day?

A. At all times during the day.

Q. After the garments are made up and packed, your firm ships them out?

A. That is right.

Q. Have you any idea of the percentage of commodities that go to points outside the State of Pennsylvania?

A. I should say around eighty—eighty per cent.

Q. Does Fishman & Tobin do a mail order business?

A. Yes.

Q. Do they ship by any other means than parcel post?

A. Do we ship by any other means?

Q. Yes.

A. Oh, yes.

Q. Do you ship by railway express?

A. Yes.

Q. Do you ship by motor freight?

A. Yes.

Q. Do you ship by railroad?

A. Yes.

Q. In handling your outgoing shipments, do you deliver to the carrier at the carrier's place, or does the carrier pick up at your premises?

A. The carrier picks up at our premises.

Q. Is there any regularity with which the carrier comes and picks up?

A. Yes.

Q. How frequently and at what times do they come?

A. It is three o'clock and quarter after five.

Q. Daily?

A. Daily.

Q. Where do they come—to the fifth floor or to the loading platform downstairs?

A. Fifth floor.

Q. Are the packages addressed, sealed, packed and so forth, on the fifth floor before they are handed to the carrier?

A. Yes.

Q. And then what does the carrier do with them—take them down in the elevator and put them on his truck?

A. That is right.

Q. Does a week ever pass, Mr. Rash, during which Fishman & Tobin do not make shipments to points outside the State of Pennsylvania?

A. No.

Q. During the last two years, since October, 1938, has a week ever passed in which it has not happened?

A. Never.

Q. With respect to incoming shipments, has a week ever passed in which you did not receive any incoming shipments from outside the State of Pennsylvania—in the last two years?

A. No.

Q. Can you give us an approximation of the frequency with which you make shipments outside of the State of Pennsylvania? Is it daily, or once a week, or more times a week?

A. It is daily. We make shipments daily outside of the State.

Q. In describing the process by which you say these boys' wash suits were made, you said something about pressing, I believe; is that so?

A. Yes.

Q. In pressing, what type machinery do you use?

A. Hand iron.

Q. How are those hand irons heated?

A. With steam.

Q. Do you know where the steam comes from?

A. Building.

By The Court:

Q. You use the steam inside the iron?

A. Yes.

Q. By a tubing of some kind?

A. That is right.

By Mr. Brodie:

Q. How many irons that are operated by steam furnished by the building are used by Fishman & Tobin in manufacturing boys' suits?

A. Around forty-two—forty-three—something like that.

Q. Is steam used for any other purpose in the manufacture of these suits?

A. No.

Q. Do you know, Mr. Rash, whether it would be possible for Fishman & Tobin to manufacture and press these suits without steam?

A. No, I do not think so.

MR. MASON: I cannot hear that. What?

THE WITNESS: I do not think we could without the steam. We need the steam to press the garments.

MR. MASON: You say—

THE WITNESS: We need the steam to press the garments.

MR. MASON: That is not what he asked you. Could you do it without steam?

THE COURT: He says, "I do not think we could without steam." That is his answer.

By MR. BRODIE:

Q. Just at what point in the productive process of making the suits is steam used? Is it the first, the middle, or the last point?

A. It is the last.

Q. Does your firm use the elevators that the building has?

A. Elevators?

Q. Yes.

A. Yes.

Q. For passengers, or freight, or both?

A. Both.

Q. Do you use all three elevators?

A. Yes.

Q. Do you ever have customers come up to visit you on the elevators?

A. Sometimes.

Q. I assume the employes and also the members of the firm use the elevators to go to and from work, and at the lunch hour?

A. That is right.

Q. If the elevators stopped running, Mr. Rash, could Fishman & Tobin get any raw materials to manufacture, or ship out any finished products?

A. They could ship out finished products. If we could not—if we did not have the elevators, we probably could make our packages small enough to carry them down, but as far as coming up, I think I said before we could not manufacture—we need the elevators to bring the merchandise up.

MR. MASON: I am sorry, but I do not know whether it is the way you are sitting, but I just cannot hear your answers. Will you read that answer?

THE COURT: He says they could make the packages small enough to take them out without using the elevator, but as far as incoming packages, he does not believe they could get them up.

MR. MASON: That depends, of course, on how they were shipped.

THE COURT: Yes.

By MR. BRODIE:

Q. Does the building also supply a watchman, do you know?

A. Yes.

* * * (Tr. pp. 162, 163.)

Q. Do you know whether, Mr. Rash, your firm would remain in the Kirschbaum Building as a tenant if the watchman was not supplied?

A. Yes, sir.

Q. It would?
A. Yes, sir.

Mr. Mason: Ask another, Mr. Brodie.

The Court: That is what you get. It is an old story, isn't it?

By Mr. Brodie:

Q. Mr. Rash, let us revert a moment to the shipment of the outgoing merchandise, which you say could be carried downstairs if shipped in a slightly different form. Would not mean, instead of one large case to a customer, you might have to split it up into fifteen, twenty, or more packages?

A. That is right.

Q. Would that be a more expensive process?

A. Yes.

Q. To what extent would that inconvenience your operations?

A. I could not say exactly, but it would give us a little hardship—it would be a little more trouble.

Q. The building also supplies heat to the premises occupied by Fishman & Tobin, does it not?

A. That is right.

Q. Do you know whether it would be possible to operate in those premises during the cold winter months without heat?

A. No, you could not operate without heat.

* * * (Tr. pp. 164-167, inc.)

Cross-examination.

By Mr. Mason:

Q. Mr. Rash, in answer to some of Mr. Brodie's questions, you were telling about the use of heating irons for pressing.

A. Yes, sir.

Q. Now, you do a great deal of pressing with what you call gas irons, do you not—heating irons?

A. Heating irons.

Q. What?

A. Yes.

Q. And that gas is obtained from the Philadelphia Gas Works Company? You buy it from what you call the "U. G. I.", I suppose?

A. I don't think so.

Q. What? Well, where would you get it? You do not make it?

MR. MOETSCH: Could I answer that?

MR. MASON: No, you cannot answer that.

By MR. MASON:

Q. Where do you get the gas you use in the irons you use to press with?

A. I would rather not answer that. I may be under the wrong impression. I thought we were getting the steam through the building.

By THE COURT:

Q. We are not talking about steam—gas.

A. Oh, the gas. Gas, we get through the U. G. I.

By MR. MASON:

Q. That is right, and you use those irons to press with, don't you?

THE COURT: Do you not own irons that are heated by gas?

THE WITNESS: Yes.

THE COURT: And you use those irons for what?

THE WITNESS: For pressing of the garments.

By Mr. Mason:

Q. Pressing of the garments; and you use steam to press some with?

A. That is right. We need steam in there, too, yes.

Q. Yes. And did you ever in the old days, before there was a steam iron, know that you used a heated iron and a hot rag—a wet rag—in order to press with?

A. No; that was probably before my time.

Q. What?

A. Probably before my time.

Q. I think it was. You spoke also of heat as an absolute essential to your manufacturing establishment. What heat were you talking about—the heat that heated your building?

A. Heated the building, yes.

Q. For the comfort of the employes?

A. That is right.

Q. Were you around in 1918 when there was no heat in many of the buildings in Philadelphia?

Mr. Brodie: I object to that.

Mr. Mason: I want to show you that it is not necessary.

The Court: That is proper cross-examination, since he made that statement.

By Mr. Mason:

Q. Were you around here in 1918—the time when there was no heat allowed in any of these office buildings and loft buildings during certain days of the week?

A. I was too small at the time to remember.

Q. You were too small at the time to remember.

The Court: I don't believe they would stay long if they didn't have the heat there.

Mr. Mason: Fortunately that war did not stay very long to make it necessary.

THE COURT: No, but I mean now.

By MR. MASON:

Q. May I ask you what raw materials you were talking about in answer to Mr. Brodie's question, that came from states other than Pennsylvania?

A. We get rayon, cotton, wool.

Q. Cotton and wool?

A. Yes.

Q. Do you get the cotton raw, or do you get it made up in cotton goods?

A. Goods.

Q. Cotton goods?

A. That is right.

Q. Do you know where the manufacturer who makes the cotton goods gets his cotton?

A. Where he get the cotton?

Q. Yes.

A. No, I could not say.

Q. You do not know?

A. No.

Q. You do know what cotton is, don't you?

A. Yes.

Q. You do know that cotton which is grown in some parts of the South is essential to the cotton goods you have been using?

A. That is right.

Q. That does not grow to any very great extent in Pennsylvania, does it?

A. No.

Q. Now, coming to your wool—do you get the raw material in the form of raw wool and process it yourself, or do you get it in the form of—

A. Piece goods.

Q. Woolen goods?

A. Goods.

Q. And is that American wool?

A. Yes. I think it is; yes.

Q. That grows on sheep? What?

A. Yes.

Q. And do you know where the sheep are raised that the wool comes from that goes into the woolen goods that you get to make these suits out of?

A. No, I don't.

Q. You do not?

A. I do not know.

Q. That is, the material itself comes from outside of the State of Pennsylvania, but the wool might be grown in Pennsylvania?

A. Possibly.

Q. Did you tell us something about the use of lights in your building—in your part of the building? You have lights there?

A. Oh, yes.

Q. And where do you get your light from—the Philadelphia Electric Company?

A. Philadelphia Electric Company.

Q. And that is for the purpose of lighting as well as operating the machines?

A. That is right.

Q. Do you operate any of your machines by steam?

A. Other than the—no.

Q. None at all—that is all, thank you.

Re-direct-examination.

By Mr. Brodie:

Q. Just one question, Mr. Rash. These irons which are heated by gas also use steam, do they not?

A. Yes, that is it.

Q. Steam and gas are used in the same iron; isn't that so?

A. Yes; that is it.

LOUIS CASCIATO, having been duly sworn according to law, was examined and testified as follows (Tr. pp. 172-186 inc.):

Direct-examination.

By MR. BRODIE:

Q. Where do you live, Mr. Casciato?

A. 5646 Warrington Avenue.

Q. In what business are you?

A. I am connected with D'Alonzo-Lancaster, Inc., tailors to the trade.

Q. Where is the plant of D'Alonzo-Lancaster, Inc.?

A. At Broad and Carpenter, on the sixth floor of the Kirschbaum Building.

Q. What is your connection with that company?

A. I am assistant secretary and treasurer.

Q. Are you completely familiar with all the business done by D'Alonzo-Lancaster?

A. Practically all.

Q. Are you familiar with the nature of their operations?

A. Yes, sir.

Q. You described their business as "tailors to the trade." Just what did you mean by that?

A. Well, to put it in another way, it is wholesale custom tailors. We cut one suit at a time, individually.

Q. Men's suits or ladies' suits?

A. We do mostly men's—we have started ladies' clothes about a year ago.

By THE COURT:

Q. They take your measure in the store and they send it in to you?

A. That is it, and we finish it according to measure.

By MR. BRODIE:

Q. And as your plant on the sixth floor of the Kirsch-

baum Building, just what operations take place in the making of these suits?

A. You mean from the minute the order gets into the house?

Q. Yes.

A. It is a long process: we open by opening the mail—

Q. You can skip that. You get the order?

MR. MASON: May I interrupt just a moment, because I want to get clear the relationship of this witness and his company to the Kirschbaum Company. Did you develop that—as to whether or not he has any direct relationship with the building?

MR. BRODIE: I intended to develop that.

MR. MASON: Suppose you do that before you get into this: it may shorten it quite a bit if you will.

THE COURT: Is he a tenant?

MR. BRODIE: He is a sub-tenant.

MR. MASON: He has no relationship to the landlord at all.

By MR. MASON:

Q. Who do you lease from?

A. Nicholas D'Alonzo, also president of the D'Alonzo-Lancaster, Inc. He is the one that has the lease with Kirschbaum.

Q. But who supplies—

A. And we pay him the proportionate rate of the lease.

By MR. BRODIE:

Q. Now, will you please answer the last question that I put to you before Mr. Mason—

MR. MASON: What was that?

By Mr. Brodie:

Q. The question was, will you describe what happens in the operations of your business?

Mr. Mason: I object to that, sir, because there is no relationship here between this witness's business and the landlord at all; and therefore no connection between the landlord and whatever this sub-tenant may be doing.

The Court: Well, I will hear it subject to the objection, I think.

The Witness: You want me to explain?

By The Court:

Q. What happens is that you get some cloth in there, don't you?

A. No, first thing we do, we prepare for the season. We buy woolens and make what is known as a "sample line" and we send it out to the tailors and dealers.

Q. Like Wanamaker's and Strawbridge's?

A. Yes, you may go to Wanamaker's and pick up a piece of goods and they measure you.

Q. Oh, I have done it.

A. I don't know whether I am speaking out of turn.

Q. I didn't know whether you made it up—

A. I hope the Court may advise me, because sometimes I may give away a name like this—attorneys may ask you, do you do business with so and so?

Q. I don't care about that.

A. That is the way it works.

Q. And you make up the sample line and send it around to the stores?

A. That is it.

Q. After taking a man's measure in the store, what happens?

A. The order comes in and we turn it in to Nicholas D'Alonzo, who manufactures it for us.

By Mr. Brodie:

Q. Mr. Casciato, before you get the goods, do you do any sponging or shrinking of them?

A. No, the sponging and shrinking is done by Schwarzwaelder's.

Q. Is that done before it comes in your plant?

A. No, the piece goods comes in our plant first; then Schwarzwaelder's man picks them up, examines them, takes them out, sponges them, and brings them back to us.

Q. When he picks up the goods are the bolts rather large and heavy?

A. Yes; they average seventy to eighty yards to a bolt.

Q. Do you know how much a bolt of cloth would weigh?

A. Well, your average piece of goods today runs from nine and a half ounces to the yard to fourteen ounces to the yard, so if the bolt is sixty yards, you got to multiply one by the other, so a good average may be about sixty-five pounds, or something like that.

Q. Does Schwarzwaelder's man use the elevator to come up to your premises to get the goods?

A. Yes, sir.

Q. And when he leaves your premises with the goods?

A. Yes, sir.

Q. And also when he returns with the goods?

A. Yes, sir.

Q. Now, then, the goods are back in your plant, having been sponged, shrunk, and examined?

A. Yes, sir.

Q. They are cut by you and then what happens?

A. First, when the goods come back in our plant, we give it a number and put it in stock; then if we get an order on that particular goods, we pull that out of the bin and cut a suit according to the order from our tailor.

By The Court:

Q. How many yards to a suit?

A. According to the size—we average three and a half yards to the regular size.

By Mr. Brodie:

Q. And who does the sewing?

A. Nicholas D'Alonzo.

Q. On what kind of basis does he do the sewing for you?

A. He does it on a contract basis. We pay so much.

By The Court:

Q. Is that at the Kirschbaum Building?

A. On the same floor.

By Mr. Brodie:

Q. After the suits are sewn does Nicholas D'Alonzo return them to you?

A. Finished.

Q. Sir?

A. The suits are finished when we get them from Nicholas D'Alonzo.

Q. What do you do with them then?

A. We, of course, examine them and ship them.

Q. Are you familiar with the customers to whom you ship?

A. Yes, sir.

Q. Of your total business annually, about what percentage of it is with customers outside of Pennsylvania?

A. I would say from seventy to eighty per cent.

Q. Now, these raw materials that you get in—woolens that you have described—do you know where they come from?

A. Yes.

Q. Where?

A. All sections of the country—mostly from the New England States.

Q. Have you any idea what percentage comes from states other than Pennsylvania?

A. I would say about seventy-five to eighty per cent.

Q. How frequently do you get in shipments of raw materials?

A. Daily—almost daily—not the big bolts, I mean. We might miss a few days on a big bolt; but almost daily something is coming in. It may be just one suit length coming in, you see, where the customer uses his own cloth.

Q. During the last two years has it ever happened that a week has passed during which you did not get a shipment of goods from a point outside Pennsylvania?

A. When you say "goods" do you mean like for just one suit?

Q. I mean any kind of shipment.

A. Oh, no; we get it almost daily.

Q. And during the last two years, has a week ever passed during which you did not make a shipment of finished clothes outside the State of Pennsylvania?

A. No; we ship every day.

Q. By what types of transportation facilities do you ship?

A. Mostly parcel post—I could say about—well ninety per cent parcel post, and railway express is the balance.

Q. In making these shipments, do you take the garments to the carrier or does the carrier send someone to your plant for them?

A. We take them for the parcel post shipments to the post office.

Q. Yes.

A. And railway express—well, I would say even that, fifty per cent they pick up and fifty per cent we may take over, but their items are so small—

Q. Does the railway express stop regularly at your plant to see—

A. It calls every day to see if we have anything going out.

Q. Every day?

A. Every day.

Q. The incoming goods—are they unloaded at the platform downstairs or are they brought by the carrier right up to the sixth floor of your plant?

A. The carrier brings them up to the sixth floor.

Q. Do the goods come up on the elevator?

A. Yes, sir.

Q. If the elevator were not running could they be conveniently gotten upstairs?

A. Well, I don't think it would be humanly possible—if we got four or five pieces of goods—on somebody's shoulder up a stairway—something like that.

Q. How about outgoing shipments? Do you ever make them in large quantities, or only one suit at a time?

A. No, there may be twenty suits going out to one dealer, but as a rule we use mostly cartons. We may have a case shipment when we send out our display ends.

Q. How many cartons do you ship out at a time during your busy season?

A. What we consider a load. In other words, I might have twenty-five packages and say there is enough there to send the boy out to the post office.

Q. How many suits do you ship a week, approximately?

A. I would say about seven hundred—eight hundred.

Q. If the elevators were not running, would your business be seriously impeded?

A. If the elevators were not running?

Q. Yes; would it be difficult for you to make these outgoing shipments?

A. Why, yes; we would have to walk down six flights of steps.

Q. Would a man walking down six flights of steps be able conveniently to carry twenty-five cartons of suits?

A. No.
Q. Do you get lights from the Kirschbaum Building?
A. Yes.
Q. Between what hours?
A. I think seven-thirty to about five o'clock.

Mr. Mason: That is not material, Mr. Brodie. The Kirschbaum Building does not mean much in this particular instance. The sub-tenant relationship is with the tenant and not with Kirschbaum.

Mr. Brodie: The lights supplied by the building are necessary to the productive process.

Mr. Mason: They may not come from the Kirschbaum Building; they may come from the Philadelphia Electric Company.

The Court: We will see.

(Question repeated by the stenographer as follows: "Q. Between what hours? A. I think seven-thirty to about five o'clock.")

By Mr. Brodie:

Q. About five, what happens?
A. Then we get outside current.
Q. You have a switch which switches from house current supplied by the building, to outside current?
A. That is what I understand.
Q. What company supplies the outside current?
A. The Philadelphia Electric.
Q. Apart from the carriage of freight, what other use do you and your company make of the elevators in the building?
A. Well, all our employes go up and down in them.
Q. How about the customers?
A. Yes, we got customers coming up.
Q. Salesmen?
A. Salesmen.

Q. Do you find that during the rush hours there is often a jam on the elevators?

MR. MASON: What do you mean by "jam", Mr. Brodie?

By MR. BRODIE:

Q. A crush—do you find the elevators full? Do you sometimes have to wait?

A. I don't know—the only time I experience when they are busy—if all the building is letting out at noontime, the elevator comes to the fifth floor—instead of stopping at the sixth, they get their load and go down.

Q. What happens at those times? Do you walk downstairs or do you wait?

A. Oh, I wait.

MR. MASON: A typical American habit—you do not mind that interjection.

MR. BRODIE: Well, I don't think it adds anything to the case. I am not sure whether it is up to me to mind or not. If the Court does not object—

THE COURT: The Court does not object.

By MR. BRODIE:

Q. The premises that are occupied by you are also heated by the building, are they not?

A. Yes, sir.

Q. Could your company operate effectively without heat in the winter?

A. No, I do not think so.

MR. BRODIE: That, also, is, I assume, a typical American habit.

MR. MASON: Very typical.

By Mr. Brodie:

Q. Does the building supply watchmen?

A. Yes, sir.

Q. If the building did not supply watchmen would your firm engage a separate watchman?

A. Yes, sir.

Q. Why?

A. I think it is common sense. We got a lot of merchandise in there—you have no watchman, you have to have some protection system.

Mr. Brodie: You may cross-examine.

Cross-examination.

By Mr. Mason:

Q. Mr. Casciato, I ask you whether or not you engage in retail as well as wholesale business.

A. Yes, sir.

Q. Will you tell us to what extent?

By The Court:

Q. What do you mean by "retail"? What is your definition?

A. In the retail, Your Honor, it is mostly done on friendship. In other words, all my friends know I am in the tailoring business—they come up and say, "Louis, will you make me a suit?" And we sell at retail; but we don't advertise it. When I say "don't advertise," we don't put out no signs "factory to you."

Q. What is your wholesale business? Who are your customers there?

A. Tailors—we will say Wanamaker's—we mentioned Wanamaker's—custom tailors.

Q. Large stores?

A. Yes, or haberdasheries—it does not necessarily have to be a large tailoring establishment.

Q. Anybody that advertises they make suits to measure?

A. That is it.

Q. They send it in to you?

A. That is it.

MR. MASON: I have no further questions. Is there anything else?

MR. BRODIE: I have one further question to clear up this matter of retail business.

By MR. BRODIE:

Q. What percentage of your total business does this retail business amount to?

A. Oh, it is very, very small: I do not think it amounts to five per cent—not even that. It is very, very small.

MR. BRODIE: This witness also has records relating to shipments: there is no controversy over that?

THE COURT: If there should be, I will permit you to have him brought back.

MR. BRODIE: Then, sir,—

MR. MASON: I will say now there is not. I would like to move to strike out this witness's testimony.

THE COURT: You may make your motion: I will hold it.

MR. MASON: Your Honor will reserve ruling on it?

THE COURT: Yes.

MR. MASON: The motion is to strike out testimony on the ground that as an occupant of the building, he has no direct relationship to the owner as landlord, and the services concerned, and also, may I suggest—as counsel for the government appreciates—

that there is an exception in the Act with respect to those engaged in retail businesses.

THE COURT: All right; shall we adjourn until ten o'clock on Monday? Do you think it will take more than Monday?

MR. BRODIE: I think we should finish during Monday—perhaps late in the afternoon.

MR. MASON: We will go on this coming Monday at ten o'clock.

THE COURT: Yes.

(Adjourned until Monday, November 18, 1940, at 10.00 o'clock A. M.)

ADMISSIONS BY DEFENDANT FOR PURPOSES OF THIS CASE (Tr. pp. 199, 200.)

Denying that it or any of its employees are subject to or covered by the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; U. S. C., Title 29, Sec. 201 *et seq.*), hereinafter called the "Act", A. B. KIRSCHBAUM COMPANY, a Pennsylvania corporation, defendant above named, by its undersigned attorneys, for the purposes of this case only, hereby stipulates and agrees:

That with respect to the following named persons who are or have previously been in the employ of the Defendant, the Defendant, from time to time, during the period stated in the Complaint filed in this case did not comply with the provisions of Section 7;

WILLIAM MENTZEL
McKINLEY EDWARDS
PETER ROCK
COLEMAN RUCKER

and with respect to the following named persons,

GEORGE E. SIMON
HARRY J. GALLAGHER
GEORGE EPPS
SAMUEL H. FLEMING
NICHOLAS CATTELISE
CLARENCE BERKELEY

the Defendant, from time to time, during the period stated in the Complaint filed in this case did not comply with the provisions of Section 6 and 7 of the said Act.

* * * (Tr. p. 200.)

ADOLPH W. HABER, having been duly sworn, was examined and testified as follows (Tr. pp. 200-216 inc.):

Direct-examination.

By MR. VOTAW:

Q. Mr. Haber, by whom are you employed?

A. Joseph B. Haber, Incorporated.

Q. And where is their place of business?

A. In the Kirschbaum Building, at 1335 Washington Avenue.

Q. What is your connection with Joseph B. Haber, Inc.?

A. I am secretary of the organization.

Q. Are you familiar with the business of that corporation?

A. I am.

Q. What is the business of that corporation?

A. Manufacturing knitted outerwear, sweaters and bathing suits.

Q. Does it operate continuously throughout the year?

A. It does.

Q. And what is the nature of your production operations?

A. We take in the raw material in the shape of yarns, knit them, cut them, operate them, and ship them in the form of bathing suits and sweaters.

Q. That is all done on your premises?

A. That is correct.

Q. Do you have to shrink the yarns after you cut them, or process them in any way?

A. Just steaming them to bring the cloth to the desired width for cutting and pressing the finished garments.

Q. What do you use, what kind of a machine do you use for that operation?

A. We use a decatising machine, which employs or uses live steam.

Q. Where do you get the live steam?

A. From the Kirschbaum Building.

Q. And what machine do you use for pressing?

A. A regular Hoffman press, also uses live steam, also delivered by the Kirschbaum Building.

Q. Could you operate your business without those machines?

A. No, we could not.

Q. Where does this yarn come from?

A. Mostly from New England and the South, depending upon whether it is worsted or cotton; worsted from New England, cotton from the South.

Q. In what form does it come? How does it come?

A. In cases.

Q. What size cases?

A. Around three hundred pounds apiece, I would say.

Q. Which floor are you on?

A. Second floor.

Q. How does that yarn get to your floor?

A. By elevator.

Q. By what agencies does it come from the South or from New England?

A. By water, by train, by motor truck, various methods, depending upon the source.

By Mr. Mason:

Q. How do you know that?

Mr. Mason: May I interrupt,—just a moment, Mr. Haber—because you are asking this witness to indulge in considerable speculation. I don't want to restrict him too much, but I am just curious to know whether he knows what he is talking about.

A. Why, when we get our invoices they are always accompanied by bill of lading which shows method of shipment, and quite often we have to call up to find why a shipment is delayed, and on those occasions I have had occasion to call all three types of agencies.

By Mr. Votaw:

Q. There is no speculation involved in where this came from, then?

A. No, sir, none whatever.

By Mr. Mason:

Q. Do you do all of that yourself?

A. I beg your pardon?

Q. Do you do all of that yourself?

A. No, sir, I don't, we have girls employed in the office.

Q. All right, go ahead.

A. But it is all directly under my supervision.

MR. MASON: Go ahead, Mr. Votaw.

By MR. VOTAW:

Q. Is it delivered to you on the platform on the ground floor or at your place of business?

A. At the platform—oh, I am sorry, you will have to qualify that question. I can't answer it exactly.

Q. Well, do your employees bring it up from the ground floor?

A. No, sir.

Q. Or does the carrier bring it up to you?

A. The carrier brings it up and delivers it to us on our floor.

Q. I see.

A. We sign for it on our floor.

Q. You sign for it on your floor?

A. That is correct.

Q. Would it be possible to get these shipments to your floor without the elevator?

A. It is possible, but difficult.

Q. Possible, but difficult. Where do you ship the completed sweaters and bathing suits?

A. All over the country.

Q. Have you any idea what per cent of your shipments are made to points outside of the State of Pennsylvania?

A. I should say about eighty to eighty-five per cent.

Q. Are those shipments under your supervision?

A. Well, yes,

Q. They are, and you are personally familiar with the places to which the shipments are made?

A. That is correct.

Q. You have your records with you showing shipments and also receipts, have you not?

A. I brought with me, bills, paid bills, showing payment for yarns received from New England and the South, both, and I brought with me bills of lading show-

ing shipments made to Chicago and Wisconsin, and places of that sort. I didn't bring but representative groups of that particular type.

MR. VOTAW: We understand, Your Honor, similarly to the ruling made last week, that it is not necessary to put those in evidence.

THE COURT: You have the right to put them in in case the evidence of the witness given on the stand is controverted in any way.

MR. VOTAW: All right.

By MR. VOTAW:

Q. What means of transportation do you use for the outgoing shipments?

A. The same three means that we use to receive goods.

Q. Railroad, motor express and steamship?

A. Steamship.

Q. Does any week pass during which a shipment to some point outside of the State of Pennsylvania is not made?

A. I doubt that very strongly.

Q. Are your shipments regular throughout the year or they in seasons?

A. No, we have peak seasons. We have one season, so-called fall season, which runs during the summer months, and the spring season, which starts around November, December, January and February.

Q. In case of your outgoing shipments at what point does the carrier pick up those shipments?

A. On our floor.

Q. On your floor?

A. Yes.

Q. Now, as to incoming shipments, does any week pass during which you do not receive shipments from outside the State of Pennsylvania?

A. There may be a week or possibly two weeks during the course of the year in which we receive nothing at all in the way of large shipments, but there isn't a week that goes by that we don't receive something, either through parcel post, or a small shipment delivered by a local carrier.

Q. Where would those small shipments delivered by local carriers come from?

A. Well, they might be—they might originate in Philadelphia, or they might originate in New York.

Q. Do you know what percentage of your incoming materials comes from points outside Pennsylvania?

A. I am sorry, I didn't hear the question.

Q. Do you know what percentage of incoming material comes from points outside of the State of Pennsylvania?

A. I would say about seventy per cent, about seventy per cent. That question—that question really could only be answered on the basis of value; do you mean by dollar value or by volume, or number of shipments?

Q. Well, you say it could only be answered—

A. It is quite an unfair—

Q. —on a dollar basis?

A. You want it on a dollar value basis?

Q. Well, could you give it both on a dollar value basis and on a quantity of shipment basis?

A. Well, on a dollar value basis I should say about eighty-five to ninety per cent of our goods comes from out of the State, and on a volume basis, number of actual shipments, it is closer to the first figure, of about seventy per cent. We get a lot of supplies, like buttons, and things like that, from Philadelphia, which means a lot of small shipments, but they aren't of much value.

Q. What is the usual weight of your outgoing shipments?

A. The case will weigh around two hundred and fifty to three hundred pounds.

Q. So that it would be inconvenient, to say the least, to ship them out without the elevator?

A. Yes.

MR. VOTAW: Will you mark this for identification?

(Lease of Joseph B. Haber, Inc., with the Kirschbaum Building was marked Exhibit P-4 for Identification.)

By MR. VOTAW:

Q. I show you document which has been marked P-4, and ask you if you can identify that.

A. This is our lease with the Kirschbaum Building, lease of Joseph B. Haber, Incorporated, with the Kirschbaum Building.

Q. This lease provides, inter alia, in paragraph 44, that the building will furnish a watchman, does it not?

(The witness examined the lease.)

A. It does.

MR. VOTAW: I offer this in evidence.

MR. MASON: I am not quite clear, Mr. Votaw, whether you are offering the lease itself, or various other exhibits attached to it. What are these papers?

MR. VOTAW: It is all together—

MR. MASON: Yes.

MR. VOTAW: —in the envelope. I am assuming it is together because it should be.

MR. MASON: Sometimes that assumption is not correct.

MR. VOTAW: That is correct.

MR. MASON: It seems to have some bearing.

THE COURT: It will be received, then, as a physical exhibit.

By MR. VOTAW:

Q. How long have you been in the building?

A. If I am not mistaken, it is from 1931 or '2.

Q. Have you been with them the whole time they were there?

A. Yes.

Q. Were you there at the time when Kirschbaum Company was still manufacturing clothing?

A. No.

Q. You were not?

A. Not with my knowledge, anyway.

Q. Now, do any of the incoming shipments come in otherwise than over the elevator?

A. Yes, parcel post is brought upstairs occasionally by the postman.

Q. And how about outgoing shipments?

A. Occasionally taken out by our employees, down the steps if the elevator has ceased to run.

Q. Would they be these two or three hundred pound packages that you spoke of?

A. No, they aren't quite that heavy, as a general rule.

Q. Those would be occasional shipments which you took down?

A. Very occasional.

Q. A very small percentage of your shipments?

A. That is right.

Q. How is your portion of the building heated?

A. We get heat from the Kirschbaum Building.

Q. Would you be able to operate in the winter months without heat?

A. No.

Cross-examination.

By Mr. Mason:

Q. Mr. Haber, you say you have been in the building for several years. I didn't catch the number when you answered.

A. I believe it has been about eight years.

Q. About eight years. Where were you operating before you came to the Kirschbaum Building?

A. At 1010 Race Street.

Q. And when you moved from there did you look over the field to see whether there were other places that you could go besides the Kirschbaum Building?

A. We did.

Q. And you found a number of them?

A. Found quite a few.

Q. As a matter of fact, there is a great deal of vacant space for your kind of work in Philadelphia, is there not?

A. Millions of feet.

Q. Millions of feet. Coming now to this question of incoming material, may I ask you if you are sufficiently familiar with the products of the company to tell us just what it is that you get from other people that enters into the finished product that you ship out?

A. I believe I can answer your question.

Q. All right. Well, would you mind enumerating the major items that you acquire from other people?

A. The chief items are yarns, worsted and cotton and core yarns. They come from—

Q. Do you use any silk?

A. Silk? No, sir, we don't use any silk. They come from Down East, New England—

Q. I beg your pardon?

A. They come from New England, in case of core yarns, and worsted, and in case of cotton, from Georgia or North Carolina, or South Carolina, depending upon the mill from whom we purchase them.

Q. Do you get any yarns from Philadelphia?

A. Oh, a few pounds now and then, only when we are unable to get deliveries in time from our regular sources, because local yarns have to be processed locally, and it is more expensive—

Q. Yes.

A. —to purchase it that way than if you place a contract with a large concern and have it manufactured for you, so it is only to fill a stock gap, in case we get short in a certain color.

Q. Now, your yarns are manufactured on order, or do you buy what you call staple yarns?

A. No, we contract for the yarns.

Q. But I mean, are they specially made for you or are they—

A. Oh, no, they are staple yarns.

Q. Staple yarns?

A. The same as almost everybody else in our field uses.

Q. Now, in addition to the wool and cotton yarns, what else do you get in the way of raw material?

A. We purchase buttons, boxes, zippers, sewing thread, cloth, leather.

Q. Can you tell us whether some of all of those items come from Pennsylvania?

A. Yes, the zippers do, in some part. Talon, I believe, is manufactured in Meadville, Pennsylvania, if I am not mistaken, and there are other concerns located outside of Pennsylvania from whom we also purchase zippers.

Q. And what percentage of your product are supplied with zippers?

A. Perhaps fifty per cent are supplied with zippers.

Q. And as I gather it from general information, you would have difficulty in selling those particular articles without zippers, isn't that so?

A. That is correct.

Q. And those zippers come from Meadville, Pennsylvania, where they are manufactured by Talon, Inc.?

A. In part, yes.

Q. Yes.

A. We also purchase zippers from two other sources, and we also use foreign zippers.

Q. Use what?

A. Foreign zippers.

Q. Foreign zippers. You don't use those nowadays, do you?

A. Yes, I am afraid we do.

Q. How is that?

By The Court:

Q. Where do you get them?

A. They come from New York importers.

Q. I know, but from what country?

A. They come from the Philippines, from China and from Japan.

By Mr. Mason:

Q. Particularly from Japan?

A. Particularly from Japan, yes, sir.

Q. Yes. Then with reference to buttons, do you contract for your buttons for delivery from points outside Pennsylvania, or some from inside Pennsylvania?

A. Well, it is handled in two ways. The representative of the mill carries a small stock in Pennsylvania, in Philadelphia. Occasionally he can supply us out of his stock. When we order large quantities they come from the mill direct, and that is located in Massachusetts.

Q. And where you use buttons, the buttons are a necessary part of the product?

A. That is correct.

Q. Now, how are those sweaters and bathing suits made? Are any of them handmade, or are they all machine made?

A. All machine made.

Q. And is that machine, the running of the machine, a necessary part of the production?

A. Definitely, yes.

Q. Do the machines ever need repair or are they perfect?

A. They quite often need repair.

Q. I understand that you have one or more of your own employees that are assigned to that repair work?

A. That is correct.

Q. And you also require the services of outside machinists to do some of the repair work?

A. That is correct, also.

Q. Now, are the machinists that you bring in from outside, are they located in Philadelphia or do they come across the State line, from Baltimore or Camden?

A. Well, with only one exception that I can think of in the last three or four years, they are all from Philadelphia.

Q. All from Philadelphia. Do you use current for those machines?

A. We do.

Q. Electric current?

A. Yes.

Q. Where is that obtained?

A. From the Philadelphia Electric.

Q. Philadelphia Electric.

MR. MASON: That is all, thank you.

Re-direct-examination.

By MR. VOTAW:

Q. Do you carry a large inventory?

A. It isn't very large, no; I mean, based upon our capitalization it is fairly large.

MR. VOTAW: That is all.

NICHOLAS D'ALONZO, having been duly sworn, was examined and testified as follows (Tr. pp. 217-240 inc.):

Direct-examination.

By MR. BRODIE:

Q. Where do you live, Mr. D'Alonzo, please?
A. I live 304 Essex Avenue, Narberth, Pennsylvania.
Q. What is your business Mr. D'Alonzo?
A. Contractor, men's clothing.
Q. Contract manufacturer of men's clothing?
A. Yes, sir.
Q. Where is your shop?
A. Broad and Carpenter.
Q. In the Kirschbaum Building?
A. Yes, sir.
Q. How long have you been in that building?
A. About ten years.
Q. Will you describe to the Court what you mean by contract manufacturer of men's clothing?
A. Well, I get the work from outside and manufacture.
Q. Do you mean, Mr. D'Alonzo, that you get suits or coats all cut, and then you sew them and finish them in your plant and ship them back to the person who has shipped the cut goods to you?
A. Yes, sir.
Q. And in manufacturing those suits and coats will you describe to the Court just what you do?
A. Well, when we receive it is cut, put together, finished, and send them out.
Q. Well, do your employees sew?
A. Yes, sir.
Q. Do your employees press?
A. Sure.
Q. Do they examine?
A. Yes.

Q. Do they sew on buttons?

A. Everything.

Q. In other words, they make the finished garment from the pieces of cloth that are sent to you all cut?

A. Yes, sir.

Q. Approximately how many suits do you make weekly in your shop?

A. An average of five hundred.

Q. For whom do you do contract work?

A. In the City?

Q. Well, anywhere.

A. Well, D'Alonzo-Lancaster, and Ullman Brothers, in New York.

Q. D'Alonzo-Lancaster is located on the same floor—

A. Yes.

Q. —as your company?

A. Yes, sir.

Q. It is a sub-tenant of yours, is it?

A. Yes, sir.

Q. What connection have you with D'Alonzo-Lancaster?

A. I am a stockholder.

Q. Are you also an officer?

A. Yes, sir.

Q. What office?

A. President.

Q. Ullman Brothers is located where?

A. 79 Fifth Avenue, New York.

Q. How long have you been doing business for both of those companies?

A. About ten, fifteen years.

Q. How frequently do you get shipments of cut goods from Ullman Brothers?

A. Every day.

Q. How frequently do you ship back to Ullman Brothers in New York?

A. Well, pretty nearly every day, except a few slow months in the year.

Q. And during those slow months about how frequently do you ship?

A. Well, we have been shipping nothing.

Q. How about your business for D'Alonzo-Lancaster, does that proceed throughout the year?

A. Yes, sir.

Q. And you manufacture for that company every week in the year?

A. Every week in the year.

Q. Just what transportation facilities are used in bringing the cut goods to your plant from Ullman Brothers, of New York, and shipping the finished suits and coats from your plant to Ullman Brothers, in New York?

A. Will you say that again?

By The Court:

Q. How are they transported from Ullman to your plant?

A. By truck.

By Mr. Brodie:

Q. Is that your own truck?

A. No, sir.

Q. Or is it a carrier?

A. No, theirs.

Q. A contract carrier—

A. Carrier.

Q. —or common carrier?

A. Contractor.

Q. Do you know the name of the company?

A. The Tri-State.

Q. And when that company makes deliveries to you from New York does it bring the cut goods up to your shop or does it unload them down—

A. No.

Q. —on the street floor?

A. Right on the floor.

Q. Right on your floor?

A. Yes, sir.

Q. And you receive them there?

A. Yes.

Q. On what floor is your shop?

A. On the sixth floor.

Q. And how do they bring those goods up to you? Do they walk upstairs, or do they use the elevator?

A. Freight elevator.

Q. Are the number of suits which come in in shipments from D'Alonzo-Lancaster—is the number large, generally, or is it a small quantity—

A. Small bundle.

Q. —of suits? How many suits at a time?

A. One.

Q. One suit?

A. At a time.

Q. Well, I asked—

THE COURT: Yes, you said D'Alonzo.

By MR. BRODIE:

Q. I became a trifle confused, yes, I meant Ullman Brothers.

A. Ullman?

Q. Yes.

A. Well, depends, about three hundred or four hundred.

Q. Three hundred or four hundred suits at a time?

A. Yes.

Q. Would it be possible to carry three hundred or four hundred suits at a time up to the sixth floor from the street level?

MR. MASON: Well, now, wait a minute, Mr. Brodie, you don't really mean—they couldn't be carried up one at a time, I presume.

MR. BRODIE: I didn't ask him that, I asked if six hundred could be carried up.

MR. MASON: Well, but how? What do you mean, altogether, or one at a time, or how?

By MR. BRODIE:

Q. Could six hundred—

THE COURT: Well, I guess I understand it.

MR. BRODIE: Sir?

THE COURT: I believe I understand the situation. It doesn't make much difference how he answers the question, it is quite all right. I will answer it, "No." I will answer the question "No", as far as all practical purposes are concerned.

MR. BRODIE: All right, sir. I take it that Your Honor does not subject himself to cross-examination by that answer.

THE COURT: Oh, I am willing to.

By MR. BRODIE:

Q. Now, how many suits do you ship out at a time generally to Ullman Brothers?

A. Oh, around two hundred or one hundred and fifty a day.

Q. How are those suits shipped out? Are they packed in cases or do they go out on racks?

A. On a rack.

Q. Will you describe a rack to the Court?

A. How many in a rack?

Q. No,—

By THE COURT:

Q. What does it look like?

By Mr. Brodie:

Q. Just tell us what a rack looks like.
A. About six foot high, and a hanger—and hangers.

By The Court:

Q. Like that hat rack (indicating)?
A. A thing like that, yes.
Q. With a bar on there, and a lot of hangers?
A. Lot of hangers, yes, sir.

By Mr. Brodie:

Q. Could that be carried down six flights of stairs, Mr. D'Alonzo?
A. Well, why not?
Q. Sir?
A. Sure, you can carry it down, why not?

The Court: The answer is, "Not very well". Go ahead.

By Mr. Brodie:

Q. Now, in the manufacture of suits do you use steam?
A. Yes, sir.
Q. Sir?
A. Yes, sir.
Q. For what purpose?
A. Pressing and under pressing.
Q. How many pressing machines do you have?
A. About forty.
Q. Do you use high pressure or low pressure steam?
A. High pressure.
Q. Would low pressure steam be satisfactory?
A. No.
Q. Why not?
A. Well, it don't give you the results.

Q. Do you know at what pressure the steam must be supplied to you?

A. Around about sixty-five.

Q. Sixty-five pounds?

A. Pounds, yes.

Q. Where do you get your steam?

A. From the Kirschbaum Building.

Q. Could you operate if you didn't have steam?

A. No.

Q. If the building didn't furnish steam could you operate there?

A. I would say no.

Q. Why do you say that?

A. Because I couldn't—I couldn't produce the quality of the work without steam.

Q. Is there any reason why you couldn't supply your own steam?

A. The reason? How can I use it, I got to use gas?

Q. You would have to have a boiler on your own floor?

A. Yes.

Q. Have you ever had any experience with such a situation?

A. Oh, yes, yes, sir.

Q. Where?

A. 1224 Cherry Street.

Q. And what happened there?

A. Well, I had my own boiler, and make my own steam, and then gas; didn't have no results.

Q. Did the fact that the Kirschbaum Building supplied steam to you have anything to do with your renting the premises that you now occupy?

A. The rent didn't mean nothing; the rent?

By The Court:

Q. Did you go there because they furnished steam? Was that one of the reasons why you went there?

A. Yes, sir.

By Mr. Brodie:

Q. Was the fact that the other building in which you manufactured did not operate, did not furnish steam, influence you in making up your mind to move out?

A. If they didn't give me the steam?

Q. The last building in which you—

A. Yes.

Q. —didn't have steam?

A. No.

Q. You had to supply your own?

A. Yes.

Q. Did that have anything to do with your decision to move out?

A. Oh, yes, yes.

Q. Just what?

A. Just because didn't have enough steam.

Q. Did you find the generation of your own steam in a gas boiler in your premises more or less expensive than having it supplied by the building?

A. It was more expensive.

Q. Did you find it more or less dangerous?

A. More dangerous.

Q. Do you know whether that had any effect upon your insurance rates?

A. Well, I don't think so.

Q. Well, let me put the question this way. Was your fire insurance rate higher in the building you formerly occupied than it is now?

A. It was higher.

Q. It was higher?

A. Yes, sir.

Mr. Mason: Of course, that might be because of the building; might it not?

The Court: Well, it might be for a dozen different reasons.

MR. BRODIE: Yes, sir.

By MR. BRODIE:

Q. Do you know whether the fact that you generated steam on your own floor had anything to do with the higher insurance rate?

A. Well, I—well, that isn't up to me, I don't know, that is insurance people.

THE COURT: He wouldn't know that.

MR. BRODIE: All right, sir.

By MR. BRODIE:

Q. These pressing machines that you have, are they rather large, heavy machines?

A. Yes, sir.

Q. Does the operation of those machines transmit shocks to the floor on which they stand?

A. Well, yes.

Q. Could you hire a loft in any old building and set up thirty or forty pressing machines?

A. No, sir.

Q. Why not?

A. Well, because the floor isn't strong enough to hold those machines.

Q. Do you operate the sewing machines that you use in sewing these garments by electric motors?

A. Yes, sir.

Q. How many sewing machines do you have?

A. Sixty.

Q. Do you use electric lights in your premises?

A. Yes, sir.

Q. Where do you get the electricity for those lights?

A. Well, we get it inside and outside.

Q. Well, what do you mean by inside?

A. In the building.

Q. Kirschbaum Building?

A. Yes, sir.

Q. Between what hours do you get it from the building?

A. Seven to five-thirty.

Q. Seven in the morning until five-thirty at night?

A. Yes, sir.

Q. Mr. D'Alonzo, if there were no elevators in the Kirschbaum Building, or if the elevators stopped running, could you operate your business there?

A. No.

Q. Why not?

A. Well, for the simple reason they pick the stuff up and the people got to walk to the sixth floor?

Q. You mean that your employees wouldn't walk to the sixth floor?

A. I wouldn't permit.

Q. How many employees do you have?

A. About three hundred.

Q. What is the average weekly payroll that you have?

A. Six or seven thousand dollars.

Q. Has there ever been any occasion, Mr. D'Alonzo, when the power of the elevators failed and the elevators didn't run?

A. Well, that never happened; if it happens one elevator, they use another elevator.

Q. And do you use all three elevators in the building?

A. Who, me?

Q. I mean the people who work for you and for incoming and outgoing shipments, your company.

A. Yes.

Q. Sir?

A. They use both elevators.

Q. Both elevators?

A. Yes.

Q. Well, there are three in the building,—

A. Well,—

Q. —two together, a freight and a passenger,—

A. Yes.

Q. —in one portion of the building, and then there is another.

A. We use the front elevator.

Q. Sir?

A. We use the front elevator.

Q. The front elevator?

A. Yes, sir.

Q. Do you find, Mr. D'Alonzo, during rush hours that you are able to get sufficient elevator service, or do you find that sometimes the elevators cannot accommodate all the people who want to use them?

A. Oh, yes, we get pretty good service.

Q. Do you ever find that the elevators can't accommodate all the passengers,—

A. No.

Q. —at or about lunch hour?

A. No.

MR. MASON: I am curious to know the relevancy of this. May I ask it, Mr. Brodie?

MR. BRODIE: Sir?

MR. MASON: May I ask the relevancy of the question and answer that you got onto the record regarding the elevators, the sufficiency of the capacity of the elevators? Is this an inquiry to have an Act of Congress passed to have another elevator put in the building?

MR. BRODIE: No.

MR. MASON: What is the purpose of it?

THE COURT: I wonder myself.

MR. BRODIE: The purpose is to show the dependence of these people upon the elevator service supplied by the building, that is all.

THE COURT: All right.

MR. BRODIE: Sir?

THE COURT: I say, all right.

By MR. BRODIE:

Q. Is there a watchman in the building, Mr. D'Alonzo?
A. What is that?
Q. Is there a watchman in the building?
A. Yes, sir.
Q. Do you rely upon that watchman to any extent?
A. Oh, yes, yes, so far.
Q. If the building did not have a watchman would you hire one?
A. No.
Q. Where do you get heat?
A. Kirschbaum Building.
Q. Would you be able to operate in the cold weather months, Mr. D'Alonzo, if the building did not supply heat?
A. Well, not so easy.
Q. Mr. D'Alonzo, when you make your outgoing shipments to Ullman Brothers do your employees carry the goods downstairs and put them on the truck?
A. No.
Q. Or does the truckman come upstairs and take the goods in your factory?
A. Truckman takes care of that.
Q. Picks them up on the sixth floor?
A. Yes.

MR. BRODIE: I have no further questions.

Cross-examination.

By MR. MASON:

Q. Mr. D'Alonzo, with reference to your electric current, are all of your machines operated by electric current?

A. Yes, sir.

Q. And how many of them use direct and how many alternating current?

A. Well, I think it will be about a row of machines I use from inside the building, about ten machines; all the rest outside.

Q. How many are all the rest, about forty?

A. Forty, fifty.

Q. Forty or fifty, and those are all operated by current you get from the Philadelphia Electric Company?

A. Philadelphia Electric, yes, sir.

Q. And there are some of the lights in your place of business that are also operated by Philadelphia Electric Company—

A. Yes, sir.

Q. —current?

A. Yes, sir.

Q. Now, after you get into your place of business the pieces of the suit of clothes or garment, what additional materials do you have to have before you finish it?

A. Well, sewing, and pretty near that is all.

Q. You have what?

A. Sewing.

Q. Sewing?

A. Yes.

Q. Well, do you furnish the buttons?

A. No, they furnish the buttons.

Q. They furnish the buttons?

A. Yes, sir.

Q. Is that true of Ullman? Does Ullman furnish all buttons?

A. Ullman Brothers, yes, sir.

Q. Where did you get the zippers?

A. Well, we don't use no zippers.

Q. Don't use any zippers?

A. In case we use it, they send for them.

Q. You send for those?

A. They come with the bundle.

Q. Where do you get your thread from?

A. Philadelphia.

Q. From Philadelphia?

A. Yes.

Q. And can you make a suit of clothes without using thread?

A. No.

Q. Do you get your thread all from one place in Philadelphia?

A. Yes, sir.

Q. Your spoke of having moved from the building which you previously operated in to the Kirschbaum Building, and that in the other building you had to furnish your own steam. I understand that that is correct?

A. Yes.

Q. When you were coming to the Kirschbaum Building or contemplating moving did you examine into the available space in Philadelphia?

A. Yes, sir.

Q. Were there any buildings in Philadelphia other than the Kirschbaum Building that had a floor strength to stand the pressure that Mr. Brodie has directed our attention to in your business?

A. Well, I find that this floor one of the best for clothing, I think this floor, this building, was put up as for clothing.

Q. That is a grand advertisement, but were there other buildings that would accommodate your business? What?

A. Well, not so easy.

Q. Not so easy?

A. Not so easy, absolutely.

Q. All right. Were there other buildings that furnish steam?

A. Yes, sir, some.

Q. Some, and what is the general condition in Philadelphia today, if you know, regarding available space—

MR. BRODIE: I object—I am sorry, are you through?

MR. MASON: I wasn't, but you can interrupt now. You see what the question is going to be.

MR. BRODIE: I object on the ground that it is irrelevant.

THE COURT: Well, I don't see the relevancy.

MR. MASON: We have had it already from the other witness.

THE COURT: I will take it subject to the objection.

MR. MASON: I don't want to burden the record with anything else.

By MR. MASON:

Q. Do you use gas?
A. Yes, sir.
Q. What for?
A. Sixth, for the finished pressing.
Q. For pressing?
A. Yes, sir.
Q. That is, for gas iron?
A. Gas iron? No, gas and air, you know.
Q. How is that?
A. Gas and air, for hand pressing.
Q. Hand pressing?
A. Yes, sir.
Q. And is that a machine or an iron?
A. Iron.
Q. Iron?
A. Yes, sir.
Q. And where do you get that gas?
A. The gas? Philadelphia.
Q. From Philadelphia?

A. Yes, sir.

Q. The gas company in Philadelphia?

A. Yes.

Q. Do your machines ever need repair?

A. Oh, yes.

Q. What?

A. Yes, sir.

Q. Well, do you have it all done by your own employees, or do you have somebody outside to do it for you?

A. We got somebody outside, and I got my own man.

Q. You have both?

A. Yes.

Q. And is the mechanic who does the repair work on your machines a Philadelphian? I mean to say, does he work in Philadelphia?

A. Yes, sir.

Q. From Philadelphia?

A. Yes, sir.

Q. Is that one company that furnishes that service to you, or more than one?

A. More than one.

Q. In Philadelphia, more than one company?

A. More than one.

Q. Depending on the kind of repair work you have to have done, I suppose?

A. Yes.

Q. Pardon?

A. What say?

Q. Do you vary your outside service for repairs to the machines depending upon the kind of work that is done, or just because you change from one contractor to another?

A. Well, not all, we change, and the requirement to repair those machines.

Mr. Mason: I see, that is all.

Mr. Brodie: I have no further questions.

If Your Honor please, may I make the same remarks regarding the records of this particular witness, if there is any controversy respecting the shipments?

THE COURT: Yes.

MR. MASON: Well, that may be regarded as applying to all of the testimony regarding shipments by the tenants.

THE COURT: Yes.

MR. MASON: That includes incoming and outgoing shipments.

MR. BRODIE: Yes, sir. Mr. Sharlit.

SAMUEL SHARLIT, having been duly sworn, was examined and testified as follows (Tr. pp. 240-254 inc.):

Direct-examination.

MR. BRODIE: If Your Honor please, before commencing the examination of this witness I would like to introduce the lease between the Kirschbaum Building and Nicholas D'Alonzo. I offer these two separate papers, one dated October 31, 1936, and the other January 3, 1935, as one exhibit.

(Leases of Nicholas D'Alonzo with the Kirschbaum Building was marked Exhibit P-5.)

By MR. BRODIE:

Q. Where do you live, Mr. Sharlit?
A. 5620 Lebanon Avenue.
Q. And what business are you in?
A. Clothing men's work.
Q. Where is your shop?

A. Kirschbaum Building, Southwest Corner Broad and Carpenter Streets.

Q. What is the name of your company?

A. Isadore Spivak and Company.

Q. What is your connection with the company?

A. General manager.

Q. And what floor of the Kirschbaum Building does your company occupy?

A. Second floor front.

Q. How long have you been in that building?

A. Since 1937, April, 1937.

Q. Not quite four years?

A. That is right.

Q. I understood you to say that you manufacture men's work clothes?

A. That is right.

Q. Woolen or cotton?

A. All cotton.

Q. Will you describe to the Court just what manufacturing processes take place in your shop?

A. Well, we get in the cloth, cut them up, sew them up, press them, and we sell them to our trade.

Q. Where do you get the cloth from?

A. Mostly down South.

Q. How frequently do you get shipments of cotton cloth from the South?

A. Every day.

Q. Do you know by what types of carriers the cotton cloth comes to you from the South?

A. Yes, steamship, railroad, motor freight.

Q. Is delivery made to your shop on the second floor or are the goods unloaded at the platform at the rear of the building and then carried upstairs with your employees?

A. No, they are delivered to the platform, then on the elevator and truckman brings them up to our floor.

Q. Truckman brings them direct to your floor?

A. That is right.

Q. In what type, what types of containers—

A. Bales.

Q. —do those—sir?

A. Bales.

Q. Bales. Have you any idea how large, or how heavy those bales are?

A. They run anywheres from about three hundred and fifty to four hundred pounds a bale.

Q. In the operation of sewing these work garments do you use sewing machines operated on electric current?

A. Yes.

Q. How many sewing machines have you?

A. About forty-five to fifty.

Q. Do you know what kind of motors operate those machines?

A. You mean—

Q. Are they direct or alternating current motors?

A. They are alternating current, from the building.

Q. Sir?

A. From the building.

Q. The current is from the building?

A. That is right.

By The Court:

Q. Well, then, it is direct, isn't it?

By Mr. Brodie:

Q. The building furnishes direct current?

A. That is right.

Q. Can those motors operate on current supplied by the Philadelphia Electric Company?

A. No, not these motors.

Q. Do you, Mr. Spivak,—

A. Sharlit, I beg your pardon.

Q. I am terribly sorry, Sharlit—use any steam in your operations?

A. Yes, sir.
Q. For what purpose?
A. Pressing the garments.
Q. How many pressing machines do you have?
A. Five.
Q. And who supplies the steam to you?
A. The Kirschbaum Building.
Q. Could you operate without this steam?
A. No, sir.
Q. Why not?
A. Well, it would look like a bunch of rags after they are through.
Q. You mean—
A. They have to be pressed.

Mr. Mason: I didn't get that answer. Speak a little louder, please.

The Court: They would look like a bunch of rags after we get through, they have to be pressed.

The Witness: They have to be pressed.

By Mr. Brodie:

Q. And is the steam which the building supplies to you essential for the pressing of those garments?
A. Absolutely.
Q. Mr. Sharlit, when your company rented the premises in the Kirschbaum Building did you have anything to do with negotiating the lease?
A. I, personally?
Q. Yes.
A. Yes. It was a corporation at that time.
Q. And do you know whether your company was influenced in renting the premises in the Kirschbaum Building because it supplied steam and electric current?
A. More or less.
Q. Well, is your answer "yes" or "no"?
A. Yes, I would say yes.

Q. Would you, Mr. Sharlit, consider a loft in which your garments could not be pressed?

A. No.

Q. Does your company or the employees of it use the elevators?

A. No, only a few, maybe.

Q. That is, for passenger transportation?

A. Yes.

Q. But how about freight transportation?

A. Oh, freight, it is used every day.

Q. Where do you ship the finished garments which you manufacture?

A. Oh, several States, I would say about twenty States, twenty-five.

Q. How frequently do you make shipments?

A. Every day in the week.

Q. Do you make shipments every day to points outside the—

A. Yes, sir.

Q. —State of Pennsylvania?

A. Yes, sir.

Q. May I ask you, Mr. Sharlit, whether when you make these shipments your employees take the goods downstairs and hand them to the carrier, or whether the carrier picks them up at your shop?

A. The carrier picks them up at our shop.

Q. In what kind of containers do you generally ship?

A. Mostly in wooden cases.

Q. Approximately how large are those wooden cases?

A. Anywheres from two hundred and fifty to three hundred pounds.

Q. And—

A. Two hundred pounds.

Q. That is in weight; how much in cubic content?

A. Oh, well, it would be about, say, a yard and a half high and about two yards long, maybe smaller or bigger.

Q. Are those cases taken down on the elevator or are they carried downstairs by the truckmen?

A. Taken down on the elevator.

Q. Do you know, Mr. Sharlit, what percentage of the goods that you ship goes out of the State of Pennsylvania?

A. I would say about seventy-five per cent of it, seventy, seventy-five, around that figure.

Q. Do you mean by the number of shipments, seventy-five per cent of the number of shipments, or do you mean seventy-five per cent of the total volume of business that you do?

A. Seventy-five per cent of the total volume of business.

Q. Approximately what is the annual total of your business?

A. In the year?

Q. Yes.

A. I would say about three hundred thousand dollars.

Q. Approximately what percentage of the cotton goods and other materials you use in manufacturing these work clothes comes from points outside the State of Pennsylvania?

A. I would figure almost all.

Q. Does a week, or has a week ever passed within the last two years during which you did not receive a shipment of goods from outside Pennsylvania, and during which you did not make a shipment of goods to points outside Pennsylvania?

A. Well, maybe during the dull season, around December, maybe a day or so missed, otherwise we make shipments and receive goods every day in the year.

Q. Your shop is heated, is it not, Mr. Sharlit?

A. Yes.

Q. In the cold weather?

A. Yes, sir.

Q. Where does the heat come from?

A. From the Kirschbaum Building.

THE COURT: I will recess for ten minutes, gentlemen.

(Recess at 11.25 o'clock A. M.)

SAMUEL SHARLIT, resumed.

Direct-examination (Continued).

MR. BRODIE: Shall I proceed, Your Honor?

THE COURT: Go ahead.

By MR. BRODIE:

Q. The last question, I believe, was, "Where do you get your heat from?", and the answer was, Kirschbaum Building?

A. Yes, sir.

Q. Could your business operate effectively during the cold weather if the premises were not heated?

A. Well, I don't think so.

Q. Now, let's revert for a moment to the sewing machines which you have which are operated by direct current motors. At what time does your shop stop working?

A. Five o'clock.

Q. In the afternoon, and why is that?

A. Well, we don't get no more current, after five, around five minutes or ten minutes after five.

Q. You mean the building current shuts down?

A. On our floor.

Q. Yes, and you can't run your sewing machines?

A. No.

Q. How many employees do you have, Mr. Sharlit?

A. Around forty-five.

Q. And approximately what is your weekly pay-roll?

A. Around eight hundred dollars, eight hundred and fifty.

Mr. Brodie: I offer into evidence the lease between A. B. Kirschbaum and I. and C. Spivak, Incorporated. There is no objection to this lease?

Mr. Mason: No.

(Lease of I. and C. Spivak, Incorporated, with A. B. Kirschbaum was marked Exhibit P-6.)

Mr. Brodie: You may cross-examine.

Cross-examination.

By Mr. Mason:

Q. Mr. Sharlit, what is the difference between a direct current machine and an alternating current machine in your business?

A. A direct current machine would have—would have to have different motors to run the machines.

Q. Yes.

A. Than the alternating current.

Q. But it is only the motor, isn't it?

A. The motor is right.

Q. Yes, and did you ever think of changing over to alternating?

A. Well, there was a rumor going around the building that Philadelphia Electric is going to install the current.

Q. Yes.

A. And they would change our motors. Otherwise we would never think of it, because the motors—

Q. Well,—

A. —are very expensive.

Q. Well, the only reason you haven't got alternating current is because of the expense of putting it in, isn't that so.

A. The expense of the motors.

Q. Yes.

A. Right.

Q. Yes, it is the universal type of current that is being generally used, is that right, for your machines, the type of machines that you have?

A. You mean the general—

Q. Yes.

A. Philadelphia Electric?

Q. No. Do you know the difference between—well, let me put it this way: You know that a great many of the tenants in the building that do the same general kind of work that you do have machines that are run by a motor that uses alternating current?

A. Yes, sir.

Q. Well, why do they use that?

A. I suppose they want to work a little longer than we do.

Q. Yes, so that if you wanted to work longer than five o'clock you would put in the motors that would take the Philadelphia Electric current, which is the alternating current?

A. If we would, yes.

Q. Yes.

By The Court:

Q. But you don't do it because it is too expensive to make the change, is that right?

A. Yes, sir.

Q. Yes.

By Mr. Mason:

Q. Now, when you came to move from your former building to the Kirschbaum Building you told counsel that you were influenced by the fact that you could get steam, live steam, and you could get direct current. How many other buildings did you inquire about at that time?

A. Well, we inquired quite a few.

Q. Yes, and you found there were a number of them that could give you both steam and direct current?

A. Quite a few.

Q. Quite a few. With reference to those machines, are they new or old, the machines that you use.

A. The motors or the machines?

Q. No, the machines.

A. They are ours.

Q. Old, how old?

A. We bought them, we paid for them.

Q. I say, how old?

By The Court:

Q. How old?

A. How old? You mean the sewing machines?

By Mr. Mason:

Q. Yes.

A. Well, some of them may be ten years old, some of them may be five years old, and some may be fifteen.

Q. And how old are the motors?

A. Around that field, around five to ten years.

Q. You haven't gotten any new direct current motors in lately, have you?

A. No.

Q. Because you are contemplating changing some day to the alternating current motor, aren't you?

A. No, we are not at present.

Q. Not unless you have to?

A. Unless we are compelled to.

Q. Yes. Well, now, do you do the repairs to your machines yourself?

A. Yes.

Q. I don't mean you, personally,—

A. Yes, yes.

Q. —but somebody in your employ?

A. We have repairs to machinery every day.

Q. Well, now, are the repairs done by one of your employees, or by outside contractors that are in Philadelphia to do that work?

A. Well, most of them are done by mechanics outside of the place.

Q. Outside?

A. That is, Philadelphia mechanics.

Q. Philadelphia mechanics, and you can't run your shop without the machines running, can you?

A. No.

MR. MASON: That is all.

MR. BRODIE: No further questions.

IRVING GLONNINGER, having been duly sworn, was examined and testified as follows (Tr. pp. 255-270 inc.):

Direct-examination.

By MR. BRODIE:

Q. Where do you live, Mr. Glonninger? Where do you live?

A. 370 West Johnson Street, Germantown.

Q. What is your business?

A. Men's clothing, furnishings and uniforms.

Q. With what company are you associated?

A. Jacob Reed's Sons.

Q. In what capacity?

A. Why, I happen to be general manager of our uniform factory.

Q. Where is your uniform factory located?

A. In the Kirschbaum Building.

Q. How long has it been there?

A. Since May, 1938.

Q. Did you have anything to do with negotiating the lease between Kirschbaum Company and your company?

A. Yes, I was instrumental in the Jacob Reed's Sons becoming interested in the Kirschbaum Building. I didn't actually negotiate the lease.

Q. What influenced you in determining upon the Kirschbaum Building as a location for your uniform factory?

A. Convenience to our store, for one thing, and the fact that it was a building designed for the manufacturing of clothing; the fact, also, that we would be able to get steam. In the building we were formerly located we made our own steam.

Q. Will you please give the nature of the business carried on in your uniform factory, just where you get the goods and how the uniforms are manufactured and what happens to them?

A. Well, we simply make the uniforms at the factory. they are cut in our store, the fourth floor of our store on Chestnut Street.

Q. Yes.

A. And we deliver twice a day in our own truck to the factory the cut goods, along with the trimmings, and then they are made up—

Q. What—excuse me.

A. Sir?

Q. What operations take place at your factory?

A. The actual making of the garments, both coat and trousers and breeches.

Q. And that includes—

A. Overcoats.

Q. Sewing?

A. Yes.

Q. Pressing?

A. Yes.

Q. Finishing?

A. Finishing is done on the outside.

Q. Well, perhaps you and I use that term differently. What do you mean by finishing?

A. Well, finishing is the hand felling of the coats. That is an operation after the coat is finally assembled, after the machine work is done, then it is sent out to the finishers, and then it comes back to us again for pressing, final pressing, and then it is shipped.

Q. Oh, I see, and in the pressing of the garments do you use steam supplied by the building?

A. Yes, sir.

Q. How many pressing machines do you have?

A. Oh, I think we have ten, ten or twelve. I am not just sure of the exact number.

Q. Do you have any other pressing equipment?

A. Yes, we have what we call hand pressing machines, both steam and gas, and we have finish pressing gas irons.

Q. Would it be possible in the operation of your business, Mr. Glonninger, to send the garments out to be pressed?

A. It would be possible, but it wouldn't be practical.

Q. Why not?

A. Well, the expense and inconvenience, and loss of time of doing it, would make such an idea impractical.

Q. Is pressing the very last operation before the garments are shipped?

A. Well, the garments are cleaned after they are pressed, and—no, the buttons are sewed on after the—after the garments are pressed, and then the garments are cleaned, and special tickets sewed on, we make everything to individual measure, that is the measure of our work, and then from that point it is packed and shipped.

Q. For what types of organizations do you manufacture uniforms?

A. Well, we manufacture uniforms for schools, military schools, for Legion Posts, for individual Army, Navy and Marine officers, for hotels, for service stations. They come under the classification of industrial uniforms and military uniforms, commercial uniforms.

Q. Well, what is your largest customer?

A. Well, the United States Naval Academy.

Q. At Annapolis?

A. Yes.

Q. Approximately what percentage of your business is with the United States Naval Academy?

A. Well, I would say approximately somewhere between fifty and sixty per cent.

Q. And do you ship from that factory at Philadelphia to the United States Naval Academy?

A. Yes, sir.

Q. Do you make all shipments of uniforms from your factory in the Kirschbaum Building?

A. Yes, sir, practically all, and in some few, isolated cases we will deliver a completed uniform to our store, where a customer will call for it.

Q. About what percentage—

A. Very small percentage.

Q. —of your business does that consist of?

A. About one per cent, I would say.

Q. Apart from the United States Naval Academy, where are these other organizations—

A. Well,—

Q. —located?

A. The next largest customer is the University of Alabama, Tuscaloosa, Alabama, and most of our business, contract business, is below the Mason and Dixon Line, it is North Carolina, Georgia, Mississippi, Tennessee. We have some business in New England.

Q. Have you any idea what percentage of the finished products that are made at your factory in the Kirschbaum Building goes outside of the State of Pennsylvania from your factory?

A. I would say about eighty per cent.

Q. Is that dollar volume or number of shipments?

THE COURT: Does it really make any difference which it was?

MR. BRODIE: Well,—

THE COURT: Eighty per cent is eighty per cent.

MR. BRODIE: That is true. I just want to anticipate,—

THE COURT: All right.

MR. BRODIE: —in case the defense raises that point. I don't think it makes any difference.

THE COURT: It is pretty substantial any way you look at it.

MR. BRODIE: All right, sir.

By MR. BRODIE:

Q. How frequently do you make shipments out of the State from your factory, or how frequently have you made such shipments during the past two years?

A. We make—

Q. To points outside the State of Pennsylvania.

A. Well, I would say hardly a week goes by that we don't make shipments; in fact, hardly a day.

Q. And how were those shipments made, in what types of containers?

A. Well, we ship in individual boxes that are—if there is more than one garment to be shipped out of the State we will pack the individual boxes in cartons, and if the clothes are to be packed in bulk we will ship them in crates.

Q. What types of carriers do you use to make your shipments?

A. We use railroad, express, occasionally freight, occasionally motor truck, and sometimes our own truck, when it is a question of parcel post delivery.

Q. Do you deliver to the carrier, or does the carrier come to your plant and pick up the merchandise that you are shipping?

A. In every case except parcel post shipments the carrier comes to our plant.

Q. Do you know, Mr. Glonninger, whether or not agents of the carrier call at your plant at regular intervals for the purpose of picking up outgoing merchandise?

A. Yes, they do.

Q. How frequently?

A. Once a day.

Q. At a regular time?

A. Usually around five o'clock, between five and five-thirty.

Q. To the agents of what carriers do you refer when you mention these regular pick-ups?

A. Railway express, for example. That is the one that calls regularly.

Q. Do you know whether the agents of the carriers in removing the outgoing shipments from the premises occupied by you use the elevators?

A. Yes, use one elevator.

Q. They use one elevator?

A. Yes.

Q. Which one is that?

A. Freight elevator.

Q. Do you know what effect a stoppage in the elevator service would have upon your business?

A. It would again inconvenience both us and the carrier.

Q. You referred a little earlier in your testimony to the fact that in the building which you formerly manufactured you supplied your own steam.

A. That is true.

Q. Did you find that as practical and as efficient and as effective a method of operation as obtaining the steam from the building?

A. It is as efficient, but it is much more expensive.

Q. Do you know whether or not it is more dangerous?

A. It probably is more dangerous, because you have

to have a boiler, we had a five-horsepower boiler right on our floor. I assume that it is more dangerous, I imagine the presence of any boiler is dangerous.

Q. Just how is the steam supplied to your plant by Kirschbaum?

A. Yes.

Q. I say, just how is it supplied to your plant by Kirschbaum?

A. Well, it is supplied by lines, pipe lines from the—I am not enough of a mechanic to give you an actual description of how it is supplied, but I know its source is the Kirschbaum Building.

Q. The premises occupied by you are heated, I assume, during the cold weather?

A. Yes, sir.

Q. Who supplies that heat?

A. Kirschbaum Building.

Q. Would it be possible to operate effectively in those premises if they were not heated?

A. No, sir.

Q. Do you know, Mr. Glonninger, how many employees are employed there by your company?

A. Jacob Reed's?

Q. Yes.

A. Why,—

Q. At the factory.

A. We average, I would say, between eight and ninety. We have peak seasons, but we would average that, I think, in the course of the year.

Q. How many would you generally have during the peak season?

A. Well, we sometimes have about one hundred and fifteen, somewhere around there.

Q. Do you know what the approximate annual payroll is for those factory employees manufacturing uniforms at the Kirschbaum Building?

A. I know approximately, yes.

Q. Well?

A. It would be—it would be about—you don't want the finishing pay-roll, of course—it would be about one hundred and twenty thousand dollars.

Q. What is the total annual volume of business that goes out of the factory in the Kirschbaum Building?

A. The total annual volume of Jacob Reed's Sons business?

Q. No, of the uniform business, that is, the total annual volume.

THE COURT: That is what he means, your business.

MR. BRODIE: Your business.

THE COURT: That you do in Kirschbaum.

THE WITNESS: Oh, just in Kirschbaum, what is the total volume?

By MR. BRODIE:

Q. Approximate annual total.

A. About—oh, I would say around twenty thousand units a year.

Q. Well, can you give it to us in dollar value, approximately?

A. Oh, yes, I see what you mean. It is around between five and six hundred thousand dollars.

MR. BRODIE: No further questions.

Cross-examination.

By MR. MASON:

Q. Mr. Glonninger, where does the cloth come from, so far as you are concerned, where do you get it?

A. The cloth?

Q. In the Kirschbaum Building.

A. Well, we—we receive it—you mean where do we receive it?

Q. Where do you receive it from?

A. Oh,

Q. Reed's Store?

A. Yes—well, we receive the cloth at Reed's and cut it there, and then deliver it on our own truck to the factory.

Q. But so far as the operation of the Kirschbaum Building is concerned, the cloth all comes from the Reed plant on Chestnut Street, or the Sansom Street entrance?

A. That is correct.

Q. By a Reed truck, to your place in the Kirschbaum Building?

A. That is correct.

Q. Now, are there any other raw materials that enter into these uniforms other than the cloth which you get from a place in Pennsylvania?

A. Any other raw materials?

Q. Yes, such as silk or other such stuff.

A. I don't know whether I would be qualified to answer that. We have a—what we call our trimming department. The man at the head of that department places those orders. I know that we have to order our trimmings for the uniforms, and—

Q. You don't know whether all that stuff comes from Pennsylvania or not?

A. I know, for instance, in case of buttons, we get a good many buttons from the Waterbury Button Company, in Connecticut, in Waterbury, Connecticut; and we get canvas fronts from a concern in Philadelphia. They are made up, at least, in Philadelphia.

Q. Yes.

A. And our silk is ordered through—I am not just sure of the name. I think it is Holland Company, but I am not—

Q. In Philadelphia?

A. Well, they have a local agent in Philadelphia.

Q. Yes. With reference to the operation itself, how many machines do you have there?

A. Oh, we have—you mean what kind of machines?

Q. Sewing machines.

A. Sewing machines, about thirty.

Q. And what kind of motors do you use, direct or alternating current?

A. We use alternating current.

Q. Alternating current. Do you get all of your electricity, both for light and for power, from the Philadelphia Electric Company?

A. That is correct.

Q. And do you use gas for your pressing irons?

A. We use gas for some irons.

Q. Yes.

A. Yes, we have some under pressing operations, where we use gas, and finish pressing, hand pressing, with gas.

Q. That gas comes from the Philadelphia Gas Works Company?

A. That is correct.

Q. Now, with reference to the repair of your machines, is that done by one of your own employees or is it done by Philadelphia mechanics from outside the fac-

?

A. Both.

Q. Both?

A. We have an operator who is capable of repairing sewing machines. If anything happens to the pressing machines we usually call either an employee in our store who is capable of doing that work, or an outside contractor.

Q. Outside contractor. Thank you, that is all.

Re-direct-examination.

By Mr. Brodie:

Q. I have just one or two questions. Do you know, Mr. Glonninger, where Jacob Reed's Sons gets the cloth which comes to its Chestnut Street store?

A. Well, they get some, both—

By Mr. Mason:

Q. Well, do you know, Mr. Glonninger?

A. What?

Q. The question was, do you know?

A. Oh, I know in some cases, yes.

By Mr. Brodie:

Q. All right, where?

A. Well, we get some of our cloth from New England, some from Ohio and some from Pennsylvania; some from Philadelphia, as a matter of fact.

Q. This silk which you describe as ordered through a Philadelphia agent, do you know from where it is shipped?

A. I believe—well, I really don't know. I am not capable of answering that question.

Q. All right, sir.

A. Not qualified to answer.

Q. Do you know whether the local agent through which you place your orders for silk is an agent for an out of State—that is, out of the State of Pennsylvania—

A. I believe—

Q. —company?

A. I believe he is. I believe his home company is in New York.

Q. The under pressing and finishing irons to which you referred as using gas, do they also use steam?

A. No, sir.

Mr. Brodie: That is all.

I offer into evidence this lease between the defendant and Jacob Reed's Sons.

(Lease of Jacob Reed's Sons with A. B. Kirschbaum was marked Exhibit P-7.)

Frederick L. Hewes, having been duly sworn, was examined and testified as follows (Tr. pp. 270-285 inc.):

Direct-examination.

By Mr. Brodie:

Q. Mr. Hewes, where do you live, please?

A. Philadelphia.

Q. What is your business?

A. I am an executive for a clothing manufacturer.

Q. With what clothing manufacturer are you connected?

A. With the Progressive Clothing Manufacturing Company.

Q. In what capacity?

A. General manager.

Q. Where is the plant of the Progressive Clothing Manufacturing Company?

A. In the southeast corner of Broad and Carpenter.

Q. Is that in the Kirschbaum Building?

A. In the Kirschbaum Building.

Q. On what floor?

A. The third and fourth floors, part of the fourth floors.

Q. What kind of clothing is manufactured by your company?

A. Men's and young men's coats, pants, vests, topcoats, ovefcoats, some uniforms.

Q. Will you please describe to the Court just what operations take place at your plant in the Kirschbaum Building.

A. Well, from cloth we cut patterns and sew the garments and deliver them to our various customers.

Q. You cut the cloth there?

A. Yes.

Q. When the cloth comes in to you is it ready for cutting or must it be sponged and shrunk?

A. For the most part it must be examined, sponged and finished.

Q. Do you do that sponging and shrinking at your plant in the Kirschbaum Building?

A. Yes, sir.

Q. Do you have a sponging machine?

A. Yes, sir.

Q. How does that machine operate?

A. Well, it operates from a perforated cylinder in which live steam is allowed to permeate the cloth.

Q. Where do you get the live steam which you use in that machine?

A. It is supplied by the Kirschbaum Building.

Q. Can you tell me approximately how many yards of cloth you sponge weekly in that machine, and have during the last two years?

A. Oh, about, let's see—oh, about seventy-five hundred to—seventy-five hundred yards.

Q. Approximately an average of seventy-five hundred yards?

A. Yes.

Q. Weekly. Could that sponging machine be operated without live steam?

A. No, sir.

Q. In your operations in the manufacture of clothing do you also press garments?

A. Yes, sir.

Q. How many pressing machines do you have?

A. Oh, in operation, I should say seventy-five, seventy-five to a hundred.

Q. And how are they operated?

A. Some steam, some gas.

Q. For those which are operated by steam, does the Kirschbaum Building supply the steam?

A. They do.

Q. Do you know at what pressure?

A. About ninety pounds.

Q. Do you know, Mr. Hewes, whether during the last two years steam has been kept up continuously in those machines or whether it is shut off at times, and if so, when is it shut off?

A. Well, at the present time the steam is shut off over the week ends, Saturdays and Sundays.

Q. And how about the rest of the week?

A. The rest of the week it is on twenty-four hours a day.

Q. At ninety pounds?

A. Yes.

Q. Where do you get the cloth which you cut and manufacture into men's clothing?

A. Well, from mills located in various places.

Q. How frequently are shipments of cloth made to your plant and received by you?

A. Daily, I would say.

Q. Do you know whether those shipments come from points inside Pennsylvania or from points outside Pennsylvania?

A. Well, they come from both inside and outside.

Q. Have you any idea what percentage comes from points outside Pennsylvania?

A. I should say about seventy-five per cent would come from outside of the State.

Q. From outside Pennsylvania. Does a week ever pass, Mr. Hewes, during which you do not receive shipments of cloth from outside Pennsylvania?

A. I would say no.

Q. Where do you get your buttons and trimmings?

A. Various sources.

THE COURT: How many more of these tenants have you?

MR. BRODIE: I believe this is the last one, Your Honor.

THE WITNESS: Various sources.

By MR. BRODIE:

Q. Do you get any from points outside the State of Pennsylvania?

A. Why, yes, I imagine so. I couldn't state positively, though, where they came from.

Q. Now, this cloth which comes in to you, in what types of containers is it delivered?

A. In bales, bundles, cases.

Q. Are they bulky and heavy, generally?

A. Yes.

Q. How are they brought up to your premises, by the staircase or on the elevators?

A. On the elevators.

Q. Does the carrier deliver it directly to your premises or to the unloading platform downstairs?

A. Generally to our premises.

Q. How frequently do you make outgoing shipments?

A. Daily.

Q. Approximately what percentage of your finished products is sent outside the State of Pennsylvania?

A. Oh, I would say about seventy-five or eighty per cent.

Q. And how frequently do you make shipments outside the State, and how frequently have you made such shipments during the last two years?

A. Daily.

Q. How are these garments shipped, in cases, or racks, or in various ways?

A. Well, in various ways.

Q. Do you ever ship on racks?

A. Sometimes.

Q. About how many garments on a rack?

A. Twenty to thirty.

Q. Do you ever ship in wooden cases?

A. Yes, sir.

Q. About how large are those wooden cases?

A. They vary from one hundred pounds to ten hundred pounds.

Q. Are they picked up at your plant by the carrier or are they brought downstairs and delivered by you to the carrier?

A. They are picked up by the carrier on our floor.

Q. What carriers do you use to make outgoing shipments?

A. Railway express, fast freights, Pennsylvania Railroad and local truckmen.

Q. Do you have agents of carriers calling regularly at your plant to make shipments?

A. Yes, sir.

Q. How frequently?

A. Daily.

Q. At regular times?

A. At regular times—well, not—they may come whenever you call them.

Q. Well, do you have any that come without being called, that make a regular pick-up?

A. Yes.

Q. Which one?

A. Well, most of the motor freights or the fast freights, you have to give them a special call to have them pick up.

Q. How about the Railway Express?

A. They call daily.

Q. Now, what do you manufacture on the fourth floor?

A. At present we are manufacturing uniforms, Government uniforms, and trousers.

Q. From where are the shipments of goods manufactured, on the fourth floor, from the fourth floor or from the third floor?

A. Would you mind repeating the question?

MR. BRODIE: Will you repeat the question, Mr. Stenographer?

(The question was repeated by the reporter as follows:

"Q. From where are the shipments of goods manufactured, on the fourth floor, from the fourth floor or from the third floor?")

A. Well, we ship from both the third and fourth floor.

By MR. BRODIE:

Q. Do you ever send goods up to the fourth floor and bring goods down from the fourth floor to the third by elevator?

A. Yes, sir.

Q. Use the elevators for transportation between floors?

A. We do.

Q. Do you also use the elevators to go to and from your place of business?

A. In part.

Q. Well, you say in part; will you explain that?

A. Well, some—some employees use the elevators, others use the stairways, to the third floor. They all use the elevators to the fourth floor.

Q. Do you know whether the reason why some of the employees use the stairways to go to the third floor is because the elevator capacity is not great enough?

A. I would say that would be the reason.

Q. Does the building have a watchman?

A. Yes, sir.

Q. Do you rely upon that watchman? Does your company rely upon that watchman to any extent?

A. Yes, sir.

By The Court:

Q. Do you have your own watchman, too?

A. No, sir, we don't have our own watchman.

By Mr. Brodie:

Q. Would you adopt other means to protect your plant if the building did not supply watchmen?

A. Undoubtedly.

Q. Sir?

A. Undoubtedly.

Q. How many employees do you have?

A. It varies; about four hundred.

Q. Working in the Kirschbaum Building?

A. Yes, sir.

Q. Approximately what is the annual volume of business that your company does?

A. It would be over a million dollars a year.

Q. Can you give us an approximate idea of the annual pay-roll that your company has?

A. It would be between four hundred and five hundred thousand dollars a year.

Q. Are the premises which you occupy heated during the cold weather?

A. Yes, sir.

Q. Who supplies that heat?

A. The building.

Q. Could you operate effectively if the building did not supply heat?

A. No, sir.

Mr. Brodie: I offer this lease into evidence. Is there any objection, Mr. Mason?

Mr. Mason: No.

(Lease of Progressive Clothing Manufacturing Company with A. B. Kirschbaum was marked Exhibit P-8.)

MR. BRODIE: I have no further questions.

Cross-examination.

By MR. MASON:

Q. Mr. Hewes, one of the last subjects of inquiry was this watchman service. Is all of your space protected by the watchmen furnished by the building, or do you have it protected otherwise?

A. Not all, we have part protected by Holmes Electric.

Q. So that when you said you did not hire your own watchman, that did not mean that you did not have other protection than that which the building furnished. You have the Holmes Service?

A. For part of the premises.

Q. For part. That part is not watched or entered by the building watchmen at all, is it?

A. Not after it is closed.

Q. Not after it is closed, and I presume it would be possible to include or to extend that Holmes Service to all of your space, wouldn't it?

A. I am not sure.

Q. Not sure, but I think you said that if the building did not furnish as part of the building services a watchman you would have your own watchman?

A. Well, if you consider the Holmes Electric Protection a watchman, yes.

Q. Well, I meant to say, if you could not extend that to cover the whole of your space, and the building did not watch the rest of it, you would have your own man, wouldn't you?

A. I believe—we most certainly would have it protected in some way.

Q. With reference to your outgoing shipments, I understood you to say that approximately seventy-five to eighty per cent was shipped in various ways outside Pennsylvania. Now, the balance of it is traded inside of Pennsylvania?

A. Yes, sir.

Q. And how is that shipped?

A. Well, that is shipped parcel post, Railway Express, motor freight, railroad.

Q. Now, there is a certain proportion of it which is shipped by local truckmen, is there not?

A. Yes, sir.

Q. In Philadelphia, and do those local truckmen take the packages, we will call it, or racks, from your place of business?

A. They take it from our premises.

Q. And they deliver it to your customers?

A. That is right.

Q. And if all of your local business happens to be waiting for delivery, and the local truckman does not get there, it interferes with your business going out, doesn't it?

A. It would.

Q. With reference to your machines, I mean your sewing machines and the motors that turn them, are they controlled by direct or alternating current?

A. By alternating current.

Q. And you buy your power from the Philadelphia Electric Company?

A. Yes.

Q. Do you get light also from the Philadelphia Electric Company?

A. Yes, sir.

Q. What about gas? Do you use any gas?

A. Yes, sir.

Q. And you get that from the local gas company?

A. Philadelphia Gas.

Q. Yes.

A. United Gas, I guess.

Q. Concerning the shipments, how did you say that the goods were shipped, some in cartons, some in wooden cases, some on racks?

A. Yes, sir,—shipments outward or inward, are you speaking of?

Q. Out.

A. Yes, sir.

Q. Inward they come to you in whatever form the shipper sends them to you, I suppose?

A. Yes.

Q. Now, with reference to your outgoing shipments, do you make your boxes?

A. Partly.

Q. Partly. Where do you get your material to make your boxes from, Philadelphia or elsewhere?

A. Well, partly from Philadelphia and partly elsewhere.

Q. And what do you do about your racks, do you own the racks, or do you hire them, or do your customers have them?

A. We own them, for the most part.

Q. You own them, and where do you get your racks from, Philadelphia or elsewhere?

A. Well, we have made most of them ourselves.

Q. Most of them yourselves. Those that you don't make, you buy?

A. Well, we haven't had occasion to buy any.

Q. Haven't had occasion. Where do you get the material that you make your racks out of?

A. Philadelphia.

Q. And that material is necessary to make the racks, isn't it? You don't make the material as well as the racks, do you?

A. No, sir.

Q. They are metal racks, are they not, or wood, which?

A. They are—well, we have some—you wouldn't call them racks, most of the racks are made from metal.

Q. Metal, yes.

A. Pipe.

Q. I am not clear, Mr. Hewes, whether you told Mr. Brodie that the gas—how the gas was used. What do you use gas for?

A. We use gas for processing, for pressing.

Q. When you say processing, do you mean anything other then pressing?

A. Well, the machinist might use it for a Bunsen burner.

Q. I see, that is, it might be used in your machine shop, when you were making racks, or other such things?

A. Yes, sir.

Q. But to do those things you need the gas, do you not?

A. Yes, sir.

MR. MASON: That is all.

MR. BRODIE: No further questions.

* * * * (Tr. pp. 285-326 inc.)

DEFENDANT'S EVIDENCE.

EDWIN G. FRANK, having been duly sworn, was examined and testified as follows (Tr. pp. 327-330 inc.):

Direct-examination.

By MR. MASON:

Q. Mr. Frank, you are an officer of the Kirschbaum Company, are you not?

A. I am the building, so-called building manager; not an officer.

Q. Are you interested in the company as a stockholder?

A. I have a few shares, yes.

Q. And you are familiar with the history of the company in its relation to the building?

A. I am.

Q. Do you know the business in which the company has been and is now engaged?

A. I do.

Q. Can you tell me when the company—or, let me ask you this, what is the company's business at the present time?

A. The company's business is leasing space to manufacturers or—well, anybody who wants space. I wouldn't say necessarily; it happens that they are all manufacturers.

Q. Yes.

A. It is a loft building, what in New York would be termed a loft building.

Q. And in the course of that business does the company have any other space to offer than that in what we have called the Kirschbaum Building?

A. Well, in connection, next door to the Kirschbaum Building is a small shop, which is actually a part of the premises, but not directly connected with the building.

Q. Now, does the company engage in any business other than that of being a landlord and leasing to tenants the space in this building?

A. None whatever.

Q. And do you recall when it ceased doing its manufacturing or other businesses?

A. In the—I can't give you the exact date—in the fall of 1938.

Q. Fall of 1928. Can you tell us whether or not the Kirschbaum Company has any interest in the manufacturing or other activities of its tenants,—

A. No.

Q. —or whether it is solely that of landlord?

A. Solely that of landlord.

Q. You are a director in the company, are you not?

A. No, I am not a director.

Q. You are not?

A. Oh, that is a mistake, I take that back, I am a director, but not one of the officers.

Q. Not an officer.

Mr. Mason: From this witness, or from the record, Mr. Brodie, I was going to put in the length of time these various people were employed.

(Discussion off the record.)

Mr. Mason: I was going to ask the witness the length of time that each of these employees had been in the service of the Kirschbaum Company.

The Court: Yes, have you got a written statement?

Mr. Mason: I will just read it into the record.

The Court: Oh, yes.. You listen to this and see if it is correct.

Mr. Mason: William Mentzel, approximately twenty years.

McKinley Edwards, twenty years.

Peter Rock, ten years.

Coleman Rucker, thirty-five years.

George E. Simon, eighteen years.

Harry J. Gallagher, ten years.

George Epps, ten years.

Samuel H. Fleming was employed for eight years, but is no longer in the employ of the company, as I understand.

Nicholas Cattelise, who was on the stand, testified he began his employment this year, 1940, January, 1940.

And Clarence Berkeley, to complete the list, was in the employ of the company for a year and a half, and is now no longer employed.

By The Court:

Q. Is that a correct statement?
A. That is a correct statement.

* * * (Tr. pp. 330, 331.)

Defendant Rests.

Mr. Mason: It is my purpose to make a motion for judgment for the defendant. Whether Your Honor cares to rule on those other motions first, or just hold them in reserve also, is a matter of immateriality.

The Court: Oh, we will hold them, because I don't think any of them involve anything very vital.

* * * (Tr. pp. 331-336 inc.)

PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

(Filed May 20, 1941.)

I.

PROPOSED FINDINGS OF FACT.

1. Defendant, A. B. Kirschbaum Company, is a Pennsylvania corporation.

2. Defendant is the owner of a six story and basement factory building situated at Broad and Carpenter Streets, Philadelphia, Pennsylvania, which was formerly

occupied by defendant as a factory for the production of men's clothing. Defendant ceased its manufacturing operations some time ago and now leases space in the building to tenants who are engaged in manufacturing activities.

3. Seven of the occupants of defendant's building, occupying space on all floors, are engaged in the manufacture and sale of men's and boys' clothing, boys' wash suits, uniforms, pants, sweaters and other articles of clothing; 70 to 85 percent of the goods produced by the tenants are shipped directly in interstate commerce to points outside the State of Pennsylvania.

4. The aforesaid tenants and occupants of defendant's building receive large amounts of raw materials, semi-finished and finished goods which are shipped to them in interstate commerce from points outside the State of Pennsylvania. Seventy to 95 percent of the incoming goods received by the tenants originate outside of the State of Pennsylvania.

5. Deliveries of incoming goods to the tenants and shipments of outgoing products by the tenants occur daily with respect to most of the aforesaid tenants, and, with respect to the others of the said tenants, occur at least once a week.

6. Defendant employs one engineer, three firemen, three elevator operators, two watchmen, a porter, a carpenter and a carpenter's helper.

7. The engineer operates the house, sewer, elevator, fire and vacuum pumps in the building and also takes care of the pumps which draw water through the heating system, feed water into the boilers, and pump the cellar dry after the boilers are blown out with "live" steam. In addition the engineer keeps the elevators in repair and

periodically packs the elevator cylinders. Furthermore, the engineer supervises the proper operation and repair of the fire and sprinkler tanks and sees that the radiators are adequate to provide heat throughout the building.

8. The firemen fire and keep in operation three boilers in the building. They produce steam for heating the common portions of the building and the tenants' premises. Without heat the tenants would be unable to conduct their manufacturing operations efficiently, if at all, in the winter months.

The firemen also produce high pressure or "live" steam which is used by six of the tenants to operate over 140 pressing machines employed to press semi-finished and finished garments produced for commerce by the tenants. The "live" steam is also used by two tenants for shrinking and sponging raw and semi-finished materials prior to the completion of the garments manufactured for commerce by such tenants. Without such "live" steam these tenants would be unable to operate their pressing and sponging machines and, consequently, would be unable to complete the manufacture of the garments they make.

The steam produced by the firemen is also used to operate the hydraulic pumps which keep the passenger and freight elevators in operation. Without such steam supplied at the proper pressure the elevators would cease functioning.

The steam produced by the firemen is also utilized to operate machines owned by defendant which generate direct current electricity. This electricity is employed to light the common portions of the building and is also supplied to two tenants for the lighting of their premises during the working day and to another tenant for the operation of 45 sewing machines used by it in its manufacturing operations. Without such direct current these sewing machines could not be operated.

9. Defendant's elevator operators operate two freight elevators and one passenger elevator. The operators of the freight elevators carry goods originating outside the State up to the premises of the various tenants and carry down from the premises of the tenants goods which have begun their journey to points outside the State. Incoming goods moving in interstate commerce are delivered by common and contract carriers directly to the tenants at their premises and outgoing goods are picked up by such carriers at the premises of the tenants for shipment in interstate commerce.

10. Deliveries of incoming goods and shipments of outgoing products are made via the freight elevators and occur regularly and in large amounts every day. Such deliveries and shipments are made in cartons, bales, packing cases, wooden crates and racks weighing from 100 to 1,000 pounds. The size and weight of these deliveries and shipments are so great as to render impossible their being carried to or from the tenants' premises by means of the stairways. If the freight elevators were not operated the tenants would be unable to receive or make shipments and thus would be unable to continue production in defendant's building.

11. The operator of the passenger elevator conveys the tenants' employees to and from work and carries buyers, salesmen, visitors and actual and potential customers to and from the premises of the tenants.

12. One of the elevator operators also removes trash, refuse and waste materials from outside the premises of the tenants. The trash is placed by the tenants near the elevator entrances and fire escapes and accumulates in substantial amounts. Removal of the trash from the elevator entrances and fire escapes facilitates the movement of the goods to and from the premises of the tenants and acts as a safeguard against what would otherwise constitute a serious fire hazard.

13. Defendant employs two regular watchmen and two of the elevator operators also serve as watchmen once or twice a month. The watchmen stand guard in the yard, collect passes from outgoing employees, see that no packages are taken out without proper authority, that strangers are not admitted to the building, and that delivery and pick-up trucks keep moving. In addition, the watchmen make hourly rounds of the building, including the premises of each of the tenants. They turn out lights, close windows, watch for leaks in radiators and in the tenants' machines and do whatever is necessary to prevent or control such leaks. They take necessary preventive measures against fire hazards and guard against thefts of the tenants' goods and equipment. Finally, the watchmen turn on the heat in the boiler room and throughout the building each morning in preparation for the tenants' production operations.

14. The porter, carpenter and carpenter's helper clean, repair and maintain the halls, stairways and other common portions of the building which are utilized by the tenants.

15. Most of defendant's employees have been employed by defendant for many years, including the period in which defendant itself engaged in manufacturing operations in the building. During that period the employees were engaged in substantially the same duties they have been performing since defendant ceased manufacturing and rented its premises to others.

16. All of defendant's employees are engaged in activities or occupations which are necessary to the production of goods for commerce carried on by the tenants.

17. From 1927 to 1939 there were 103 strikes throughout the country involving building service and maintenance employees. Of these 40 involved disputes over wages

and hours. Out of a total of 70,737 employees who struck 49,722 did so because of unsatisfactory wage and hour conditions. During these strikes an aggregate of 673,447 man-days was lost and of this amount 539,766 man-days were lost in strikes involving disputes over wages and hours.

18. In February, 1939 a strike arising from a dispute involving wages and hours was called by maintenance and service employees in loft buildings in the garment producing area of New York City. These employees performed functions substantially identical with those performed by defendant's employees. The stoppage of elevator service and in the supply of heat and "live" steam prevented employees and customers of the tenants in the struck buildings from reaching their premises and caused a cessation in the production of goods for interstate commerce by the tenants.

The breakdown in elevator service also disrupted the interstate transportation of goods consigned to the tenants and produced by the tenants for shipment in commerce.

Further, the New York strike impeded production for commerce carried on in other states. Many manufacturers in the New York garment area have their goods processed by contractors in other states and the cessation of production in New York resulting from the strike caused production by the out-of-state contractors to be similarly disrupted.

19. During the period from October 24, 1938 until October 24, 1939 defendant paid many of its employees who were engaged in the activities described less than 25 cents an hour; and during the period from October 24, 1939 until the date this action was filed defendant paid many of its said employees less than 30 cents an hour.

20. During the period from October 24, 1938 until October 24, 1939 defendant employed many of its afore-

said employees for workweeks longer than 44 hours, and during the period from October 24, 1939 until the date of the filing of this action defendant employed many of its aforesaid employees for workweeks longer than 42 hours, without paying overtime compensation for the hours in excess of the said number of hours at rates not less than one and one-half times the regular rates at which said employees were employed.

II.

PROPOSED CONCLUSIONS OF LAW.

1. The freight elevator operators employed by defendant are engaged in interstate commerce.

2. All defendant's employees are engaged in the production of goods for interstate commerce.

3. Defendant is subject to the provisions of the Fair Labor Standards Act and its employees are entitled to the benefits of said Act.

4. Defendant has violated Section 15(a) (2) of the Fair Labor Standards Act in that it has failed to pay many of its employees engaged in commerce or in the production of goods for commerce the minimum wages required by Section 6 of the Act and has failed to pay the overtime compensation required by Section 7 of the Act.

5. Defendant's employees are not engaged in a service establishment within the meaning of Section 13(a) (2) of the Act.

6. The Fair Labor Standards Act is a valid exercise of the power of Congress to regulate commerce.

7. The Act does not violate the due process clause of the Fifth Amendment.

8. The Act does not violate the Tenth Amendment.

9. Plaintiff is entitled to an injunction enjoining and restraining defendant from violating the provisions of Section 15(a) (2) of the Act.

OPINION OF THE DISTRICT COURT SUR PLEADINGS AND PROOFS.
(Filed Apr. 2, 1941.)

Before KIRKPATRICK, *J.*

This is an action under the Fair Labor Standards Act (Sec. 17) to enjoin certain violations of Secs. 6 and 7. The defendant concedes that, as to certain of its employees, it has not complied with the requirements of these sections.

The constitutionality of the Act having been established by the Supreme Court in U. S. v. F. W. Darby Lumber Co. (February 3, 1941), the only question to be decided is whether it is applicable to this defendant.

The defendant is the owner of a six story loft building in Philadelphia, portions of which it leases to manufacturing concerns, most in the clothing business. The tenants are engaged in interstate commerce, but the defendant has no interest in the business of any of its tenants.

As part of the consideration for the rent, the defendant furnishes the services of three elevator operators, two watchmen, three firemen, an engineer, a carpenter and a carpenter's helper, and a porter or cleaner, all of whom are employed and paid by it. It also employs a cashier and bookkeeper who are not involved in this proceeding. The elevator operators carry both passengers and freight in varying ratios between the several floors of the building. The watchmen pass through the building, closing

windows, putting out lights, guarding against fires, etc. The engineer supervises the operation of the boilers, which produce steam used by some of the tenants in their manufacturing operations, the various pumps in the building, and the production of direct electric current which is used to light the building and is also used by two of the tenants; he also keeps the elevators in proper working order and takes care of the sprinkler tank. The firemen fire the boilers and occasionally supervise the running of the pumps which the engineer is called to another part of the building. The carpenter replaces sash chains, repairs the doors of the building and paints the common hallways, staircases, etc.

In general it may be said that the defendant through the above listed employees, heats the building, keeps it in repair, furnishes steam and direct electric current to those of its tenants who desire it, cleans those portions of the building which are not leased, and provides means of ingress and egress for its tenants, their employees, and for property being shipped to and by them. The defendant has no business, activities, or source of revenue other than those which are connected with its ownership and leasing of the building.

In U. S. v. Darby Lumber Company, the Supreme Court stated the objectives of the Act. "As we have said the evils aimed at by the Act are the spread of substandard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced with those produced under the prescribed or better labor conditions; and the consequent dislocation of the commerce itself caused by the impairment or destruction of local businesses by competition made effective through interstate commerce.". This epitomizes the declaration of policy contained in Sec. 2.

It is within the constitutional power of Congress to protect commerce against such dislocation. Specifically, Congress may exercise this power, either by excluding

from interstate transportation goods produced under substandard conditions or by suppressing production of such goods, or by doing both. The second method of implementing its power is sustainable independently of the first. All this is expressly ruled in the opinion of the Court.

The boundaries within which Congress may exercise its power to suppress production of condemned goods have not been precisely fixed by the Supreme Court. Congress itself has asserted the extent to which it proposes to exercise this power, by declaring in Sec. 3(j) of the Act that an "employee shall be deemed to have been engaged in the production of goods if such employee was employed . . . in any . . . occupation necessary to the production thereof." Congress may exercise any of its powers to their full extent. Production is a term hardly easier to define precisely than commerce, but, granted the power to regulate or wholly suppress production for the purposes of the act, I do not think that Congress transgressed constitutional limitations in undertaking to deal with certain marginal activities so closely related with production that without regulating them there cannot be a plenary exercise of the power. This relationship is expressed in the phrase, "necessary to the production".

The activities of the employees involved in this case are, in my judgment, necessary to the production of the goods intended for interstate commerce manufactured by the tenants of the building, and I so find. The definition of "necessary" given by Chief Justice Marshall is fairly applicable. "To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable." McCulloch v. Maryland, 4 Wheat. 315, 413. The employees involved here can not be excluded from the operation of the Act unless the word necessary is interpreted to mean indispensable. So to do

would be to deny a liberal construction to a remedial act, contrary to the fundamental canon for the interpretation of statutes. See Wood v. Central Sand and Gravel Co., 33 F. Supp. 40. Since the Darby case and its express disavowal of so much of Carter v. Carter Coal Co., 298 U. S. 238, as is inconsistent with it, I find no basis for the defendant's interpretation which in effect would limit the employees subject to the Act to those who work upon or have physical contact with the article which will later move into commerce.

The argument is made that the word "employer" appearing in Sec. 6 and Sec. 7 must be construed to mean an employer who is a member of an "interstate industry," that only such employers are required to pay minimum wages and otherwise conform to the Act, and that an employee engaged in an occupation necessary for the production of goods for interstate commerce is not covered by the Act unless the whole industry of which his employer is a member can fairly be said to be an industry engaged in interstate commerce or in the production of goods for such commerce.

It may be conceded that renting buildings—the industry in which this employer is engaged—is not an "industry engaged in commerce or in the production of goods for commerce," and that Secs. 5 and 8, providing for industry committees and wage orders, cannot be applied to it. It does not follow, however, that Sec. 6 and Sec. 7, merely because they provide that the progressive increases in the minimum standards ordained to occur at definite future times may be accelerated in some, but not all, industries by administrative orders, must be limited by construction to only those industries as to which such orders can be made.

Another argument is based upon the legislative history of the Act. It turns upon the fact that bills were passed both by the Senate and the House, and subsequently changed by a conference report, which was adopted in both Houses, and which contained the text of

the law as passed. It is a fact, as stated in the conference report, that the House Bill affected only employers who were members of an industry engaged in interstate commerce, and so the character of the industry, as a whole, of which the employer was a member was made the first test of the applicability of the Act to any employee. This limitation was eliminated by the conference report. The bills as passed in Sec. 6 and Sec. 7 say "every employer," and "no employer." The defendant argues that the Senate Bill by its statement of policy impliedly contained the same limitations as the House Bill, and that, since both bills had contained the limitation, there being no disagreement upon this point, the fact that the bill reported from conference did not contain it is no indication of an intention to abandon it, but the contrary. But I do not think that the Senate Bill can be read as containing the limitation, and the conclusion which I draw from legislative history of the Act is that in its final enactment it was intended to cover all employers with the exception of those specifically exempted by Sec. 13, regardless of the general characteristics of their industry. It is thus the nature of the employee's occupation which determines whether or not the employer is, so far as the employee is concerned, subject to the Fair Labor Standards Act. Sunshine Mining Co. v. Carver, 34 F. Supp. 274.

The remaining question is whether the defendant here comes within the specific exemption of Sec. 13(a) (2) as a "service establishment". There is a further limitation that if so, the greater part of such servicing must be in intrastate commerce, but unless the employer can be classified as a service establishment, this second requirement is unimportant. Unquestionably, most if not all of the work done by the employees in this case could be properly described as servicing. But the defendant's business is primarily leasing a building for manufacturing purposes. It sells or rents space. In order to pro-

mote its business it offers certain services to be rendered by some of its employees. The test, however, must be the primary business of the employer, not the particular occupation of the employee, for the exemption relates to employers only. It has been held that a business of this kind is a "manufacturing establishment" (Barfoot v. White Star Line, 170 Mich. 349). It is not necessary, however, to go so far. Nor is it necessary to hold as the Government contends, that a service establishment within the meaning of the Act is one which possesses essentially the same characteristics as a retail establishment. However the defendant's business may be classified, it is not in my opinion a service establishment.

Findings of Fact.

The facts stated in the foregoing opinion may be taken as special findings of fact. In addition, the plaintiff's requests for fact findings Nos. 1 to 16 inclusive are affirmed by the Court and adopted, to which is added the further finding that the defendant between October 24, 1938, and October 24, 1939, has violated Secs. 6 and 7 of the Fair Labor Standards Act in its payment of wages and its hours of employment in respect of the employees referred to in these findings. In view of the defendant's concession, it is unnecessary to find the precise extent of the violations.

Ruling on Evidence.

The defendant's objection to the evidence offered by the plaintiff to establish the facts contained in its 17th request for fact finding is sustained.

Conclusions of Law.

The plaintiff's request for conclusions of law are all affirmed.

Judgment for the plaintiff in accordance with the prayer of the complaint.

JUDGMENT.
(Filed April 28, 1941.)

This case coming to be heard upon testimony submitted by both parties, and the Court having found that the employees of the defendant involved in this case are engaged in commerce or in occupations necessary to the production of goods for interstate commerce manufactured by tenants of the defendant's building, and that the business of the defendant is not that of a service establishment within the meaning of Section 13(a) (2) of the Fair Labor Standards Act of 1938, and that the defendant has violated Sections 6 and 7 of the Fair Labor Standards Act of 1938 in its payment of wages with respect to the employees involved in this action, and that the plaintiff is entitled to a judgment in accordance wtih the prayer of the complaint.

Now, Therefore, upon motion of the attorneys for plaintiff, it is

Ordered, Adjudged and Decreed that defendant, its agents, servants, employees, officers and attorneys, and all persons acting or claiming to act in its behalf and interest, be, and they hereby are, permanently enjoined and restrained from:

(1) Violating any of the provisions of Section 15(a) (2) of the Fair Labor Standards Act of June 25, 1938, 52 Stat. 1060, 29 U. S. C., Sec. 201 *et seq.*, hereinafter referred to as the Act;

(2) During the period from the date of this judgment to October 24, 1945, paying any of its employees employed as elevator operator, watchman, fireman, engineer, carpenter, carpenter's helper, porter or cleaner, at its place of business, Southeast Corner of Broad and Carpenter Streets, Philadelphia, Pennsylvania, wages at rates less

than thirty cents (30¢) an hour; or, after October 23, 1945, paying any of its said employees employed as aforesaid, wages at rates less than forty cents (40¢) an hour, or the rate (not less than thirty cents (30¢) an hour) prescribed in any applicable order of the Administrator of the Wage and Hour Division, United States Department of Labor, issued pursuant to the provisions of Section 8 of the Act, whichever is lower; or, at any time, paying any of its said employees, employed as aforesaid, wages at rates less than the rate (not in excess of forty cents (40¢) an hour) prescribed in any applicable order of the said Administrator issued pursuant to the provisions of Section 8 of the Act, contrary to the provisions of Sections 6 and 15(a) (2) of the Act;

Nothing contained in this judgment shall be construed to prohibit the payment of wages at rates less than those prescribed above to any employee for whom the said Administrator has issued a special certificate pursuant to the provisions of Section 14 of the Act; and

(3) Employing any of its employees, employed as aforesaid, for a workweek longer than forty (40) hours, unless such employee receives compensation for his employment in excess of forty (40) hours in such workweek at a rate not less than one and one-half times the regular rate at which he is employed, contrary to the provisions of Sections 7 and 15(a) (2) of the Act.

Dated: April 28, 1941.

/s/ W. H. KIRKPATRICK,
United States District Judge.

EXCEPTIONS ON BEHALF OF DEFENDANT TO FINDINGS OF FACT AND CONCLUSIONS OF LAW CONTAINED IN THE OPINION OF THIS COURT FILED APRIL 2, 1941, AND TO JUDGMENT DATED APRIL 28, 1941.

(Filed April 28, 1941.)

To: Honorable William H. Kirkpatrick, Judge of the United States District Court for the Eastern District of Pennsylvania.

A. B. Kirschbaum Company, through its attorneys, Sidney L. Krauss, Esq., and Wm. Clarke Mason, Esq., hereby notes the following exceptions to the Findings of Fact and Conclusions of Law contained in the opinion of said Court filed on or about April 2, 1941, and to the judgment dated April 28, 1941, in the above matter.

First: Exceptions as to Findings of Fact.

The Court erred in making the following Findings of Fact:

(a) In affirming and adopting plaintiff's requests for Findings of Fact Nos. 4, 8, 9, 10 and 16; and

(b) in finding that "the defendant between October 24, 1938 and October 24, 1939, has violated Secs. 6 and 7 of the Fair Labor Standards Act in its payment of wages and its hours of employment in respect of the employees" referred to in the opinion of said Court filed April 2, 1941.

Second: Exceptions as to Conclusions of Law.

The Court erred in making the following Conclusions of Law:

(a) In affirming plaintiff's requests for Conclusions of Law Nos. 1 to 9, inclusive;

(b) In granting judgment for the plaintiff in accordance with the prayer of the complaint; and

(c) In making the following Conclusions of Law contained in the opinion of the Court filed April 2, 1941:

(i) "The activities of the employees involved in this case are, in my judgment, necessary to the production of the goods intended for interstate commerce manufactured by the tenants of the building, and I so find."

(ii) "The employees involved here cannot be excluded from the operation of the Act unless the word 'necessary' is interpreted to mean indispensable."

(iii) "I find no basis for the defendant's interpretation which in effect would limit the employees subject to the Act to those who work upon or have physical contact with the article which will later move into commerce."

(iv) "The conclusion which I draw on the legislative history of the Act is that in its final enactment it was intended to cover all employers, with the exception of those specially exempted by Sec. 13, regardless of the general characteristics of their industry."

(v) "However the defendant's business may be classified, it is not in my opinion a service establishment."

Third: Exceptions as to judgment of April 28, 1941.

The Court erred in making and causing to be entered

the above judgment and in refusing to grant defendant's motion for judgment.

Signed: /s/ SIDNEY L. KRAUSS
Attorney for Defendant,
Address: 1113 North American Building
Philadelphia, Penna.
Signed: /s/ WM. CLARKE MASON,
Attorney for Defendant,
Address: 2107 Fidelity-Phila. Tr. Bldg.,
Philadelphia, Penna.

Dated: April 28, 1941.

ORDER SUSPENDING INJUNCTION PENDING APPEAL.

(Filed Apr. 28, 1941.)

Upon consideration of the motion of defendant-appellant, A. B. Kirschbaum Company (hereinafter referred to as "defendant"), filed herein April 28, 1941, it is

ORDERED, ADJUDGED AND DECREED that the injunction granted by this Court against the defendant, A. B. Kirschbaum Company, in the judgment of this Court made and entered in the above entitled proceedings on April 28, 1941, be and the same is hereby suspended and stayed pending final determination of the appeal taken by the defendant from the aforesaid judgment of this Court to the United States Circuit Court of Appeals for the Third Circuit and that pending final determination of the appeal aforesaid, the defendant, A. B. Kirschbaum Company, shall not be required to comply with any of the provisions of said injunction or the judgment granting the same; *Provided However*, that the said defendant, A. B. Kirschbaum Company, first give security in the sum of One Thousand Dollars ($1,000.) in the form and manner required by law.

/s/ W. H. KIRKPATRICK,
United States District Judge.

Dated: April 28, 1941.

In the United States Circuit Court of Appeals for the Third Circuit

OCTOBER TERM, 1941. No. 7733

PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF-APPELLEE

v.

A. B. KIRSCHBAUM COMPANY, A PENNSYLVANIA CORPORATION, DEFENDANT-APPELLANT

APPENDIX TO PLAINTIFF-APPELLEE'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

INDEX

	Page
Further testimony of—	
William Mentzel, direct examination (Tr. pp. 35–37, 43–44)	1
McKinley Edwards, direct examination (Tr. pp. 110–111, 113–114)	2
Charles Moetsch, direct examination (Tr. pp. 123–125)	3
Admissions by Defendant (Tr. pp. 148, 181–182)	4
Testimony of—	
Peter Wall, direct examination (Tr. pp. 281–286, 289, 291–293)	4
Louis Nelson, direct examination (Tr pp. 296–300)	10
Arthur J. Nebel, direct examination (Tr. pp. 300–303, 309–311, 312–315)	12
Edward C. Maguire, direct examination (Tr. pp. 317–319)	17

413914—41——1

In the District Court of the United States for the Eastern District of Pennsylvania

CIVIL ACTION FILE No. 798

PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF-APPELLEE

v.

A. B. KIRSCHBAUM COMPANY, A PENNSYLVANIA CORPORATION, DEFENDANT-APPELLANT

Further testimony

WILLIAM MENTZEL, having been duly sworn, was examined and testified as follows:

Direct examination by Mr. BRODIE:

(Tr. pp. 35–37.)

* * * * *

Q. And before you got your license as an engineer what did you do for A. B. Kirschbaum Company?

* * * * *

A. I used to be electrician and machine fixer, steam machine fixer, and repair the dressing rooms, or toilets, and everything like that, do like all-around——

The COURT. I suppose the idea is to show that Kirschbaum is in some kind of a business, to wit, the operation of a building, and this may have some bearing on it. I don't know whether it has or not. However, go ahead.

By Mr. BRODIE:

Q. And what were those machines which you took care of?

A. Steam pressing machines——

Mr. MASON. Wait a moment, now——

A. For pressing clothing——

* * * * *

(Tr. pp. 43-44.)

Q. Do you know how long those boilers have been in the building?

A. Well, there was the old ones, they took them out about nine years ago, and we had two new boilers put in, 188 horsepower, that is the Coatesville, and the old one we had in about twelve years, 125 horsepower.

Q. Do you know whether or not these boilers which you take care of, and the pumps which you have described, perform the same functions now as they did when A. B. Kirschbaum Company was manufacturing in this building?

Mr. MASON. That is subject to my objection.

A. Absolutely; and a little more.

By the COURT:

Q. What was the answer?

A. Little more, I think there is more machines upstairs in the building than when Kirschbaum had it, Your Honor.

Q. Same kind of machines?

A. Same kind of machines, steam machines.

* * * * * * *

McKINLEY EDWARDS, having been duly sworn, was examined and testified as follows:

Direct examination by Mr. BRODIE:

* * * * * * *

(Tr. pp. 110-111.)

Q. Were you employed as a fireman when A. B. Kirschbaum operated the clothing factory?

A. Yes; I was fireman, but when I went there I wasn't employed as a fireman. I was a coal passer when I first went there.

Q. And during the time that A. B. Kirschbaum operated a clothing factory in this building were you employed there as a fireman?

A. Yes; I was firing then.

Q. What did you do?

A. I fired boilers to make steam and run those pressing machines and the dynamo.

Q. Yes; anything else?

A. Well, that is all the steam done. That is all I did at that time.

Q. Did you have anything to do with the engines?

A. Oh, not then, I didn't.

Q. Did you have anything to do with the pumps?

A. Well, when the engineer used to fix them at that time, if he didn't have no help I used to give him a hand.

Q. And has there been any substantial change in the nature of your work——

A. Oh, yes.

Q. Since Kirschbaum stopped operating——

A. Oh, yes.

Q. The clothing factory?

A. Yes.

* * * * * *

(Tr. pp. 113–114.)

A. There is two, as far as I know.

Q. When A. B. Kirschbaum Company manufactured clothing in this building did they use steam for the same purposes; do you know?

A. Yes.

* * * * * *

Q. Do you know whether steam generally was furnished for the same—was generated for the same purposes when A. B. Kirschbaum operated a clothing factory?

A. Yes.

* * * * * *

CHARLES MOETSCH, having been duly sworn, was examined and testified as follows:

Direct examination by Mr. BRODIE:

* * * * * *

(Tr. pp. 123–125.)

Q. At the time A. B. Kirschbaum was manufacturing in the building was any portion of the building rented to any tenant?

A. Yes.

Q. To what tenant?

A. That was the half of the second floor, was rented between '26 and '28—1926 and 1928.

Q. And was there any difference in the work done by the employees as you have described when half of the second floor was rented to a tenant?

* * * * * *

A. No; we had nothing to do with the tenant.

By Mr. BRODIE:

Q. Yes; has there been any difference in the kind of work done by the elevator operators, the firemen, the watchmen and others, since A. B. Kirschbaum stopped manufacturing in the building?

A. No.

* * * * * *

Admissions by defendant

(Tr. p. 148.)

The COURT. That, I believe, will be admitted. Isn't it? Is it admitted that the premises are leased to this concern for manufacturing purposes?

Mr. MASON. Oh, certainly.

* * * * * * *

(Tr. pp. 181–182.)

The COURT. I so take it. I so understand—now, counsel for the defendant will correct me—that if I find that the Act applies to any of these employees, then an injunction shall issue, and on that basis, on the basis of that understanding of the Court, I will sustain the objection and accept this admission by the defendant as evidence of the noncompliance.

Mr. MASON. Your Honor correctly interprets exactly what the stipulation says, and what was intended.

* * * * * * *

The COURT. All right; that is all right.

* * * * * *

Testimony

(Tr. pp. 281–286.)

PETER WALL, having been duly sworn, was examined and testified as follows:

5

Direct examination by Mr. BRODIE:

Q. Where do you live, Mr. Wall?

A. Laurelton, Long Island.

Q. You are here under subpoena?

A. I am.

Q. What is your business?

A. Doing labor relations and arbitration work.

Q. With what company or organization are you connected?

A. The Popular Price Dress Manufacturers Association.

Q. What is the Popular Price Dress Manufacturers Association?

A. An association of approximately two hundred and fifty manufacturers.

Q. Where?

A. In New York City.

Q. Approximately what volume of the, or, approximately what percentage of the entire volume of dresses manufactured in the New York metropolitan area is manufactured by the members of your trade association?

Mr. MASON. May I ask Mr. Brodie—I don't want to interrupt, I just would like to know whether you are talking about men's or women's dresses,

Mr. BRODIE. Women's.

Mr. MASON. Women's.

A. We represent in excess of one hundred million dollars' worth of business, which amounts to, roughly, a third of the dress business itself.

By Mr. BRODIE:

Q. And in the price range in which your manufacturers, your members, do business, what percentage of the total volume manufactured does the amount they manufacture consist of?

A. The question is not clear.

Q. In a particular price range which the members of your association cover, what percentage of the total volume sold in that price range do they manufacture?

A. About eighty-five percent.

Q. Are you familiar, Mr. Wall, with the strike of the building maintenance employees in New York in February 1939?

A. I am.

Q. Do you know when that strike took place?

A. In the first three days of February, in 1939.

Q. Do you know what was the cause of the strike?

A. In general, the wages and hours.

Q. What do you mean, a dispute over wages and hours?

A. Yes; they demanded an increase in wages and a decrease in hours.

Q. Who?

Mr. MASON. Now, just a moment——

A. The maintenance workers.

Mr. MASON. Now, is Mr. Wall—of course, I am going to make a motion in a little while, and I don't want to do it unnecessarily, but is he talking about the general information that anybody has gotten from reading the published and Mr. Thurman Arnold's statement concerning that situation, or is he talking about some personal contact with that strike, do you know? Will you develop that, please?

Mr. BRODIE. Yes.

By Mr. BRODIE:

Q. Where are the plants of the manufacturers which your association represents located?

A. They are located roughly in the area between 35th Street on the south, 40th Street on the north, Ninth Avenue on the west, and Fifth Avenue on the east.

By Mr. MASON:

Q. That is, New York City?

A. New York City.

By Mr. BRODIE:

Q. During the strike what, if any, personal contact did you have with manufacturers or landlords or representatives of unions upon which to base your statement that the strike arose out of a dispute over wages and hours?

A. We received, oh, hundreds of calls from our members demanding that we do something, so it became our duty to

find out the cause of the strike and the effect it had upon our membership, and what we as an association on behalf of those members could do, and our inquiries led us to discover the cause of the strike and the difficulties that beset our members as a result of the strike.

Q. What effect did the strike have upon the operations of the members of your trade association?

Mr. MASON. That is objected to, sir, as obviously no foundation to be offered in this case——

The COURT. Oh, I am going to take it subject to the objection. I will note your objection and take the testimony subject to it, and consider it all on a motion to strike out.

Mr. MASON. Well, I suppose there is no use of my arguing about its total irrelevancy and I don't think it will be necessary to make much of an argument eventually.

The COURT. Well, I doubt if it could be very lengthy.

Mr. BRODIE. Go ahead.

A. In view of the fact that the buildings run from about twelve stories up to forty-eight stories high, it completely disrupted the shops, the buying offices, and even mail delivery, so that business had to be stopped in those buildings, and in many instances, where it was possible for the manufacturer to get to his floor, he took some of those samples, because it was immediately preceding Easter that the strike took place, and took them to various hotels, if possible, got in touch with the buyers to get them over there.

By Mr. BRODIE:

Q. Do you know whether buyers were able to visit manufacturers?

A. They were unable to visit manufacturers during the strike.

Q. Do you know what effect it had upon shipments of incoming goods to the members of your trade association?

A. The trucks in that vicinity were so crowded, standing in the streets, with merchandise in the trucks, because of their inability to deliver to the consignees, that it became a very serious traffic menace over there, and no deliveries of any kind were made, going in or going out.

Q. Now, how about outgoing shipments, to what extent were they interfered with by this strike?

A. Practically one hundred percent at a standstill.

Q. Do you know what percentage of the total output of the members of your trade association is shipped outside of New York to other States?

* * * * *

(Tr. p. 289.)

A. Between eighty-five and ninety percent is in interstate commerce.

By Mr. BRODIE:

Q. Mr. Wall, do you know the number of workers employed by the members of your trade association which were affected by the strike?

A. We have a total number of union workers—I am not in a position to give you the workers outside of the union workers—that would probably exceed forty thousand.

* * * * *

(Tr. pp. 291–293.)

By Mr. BRODIE:

Q. Do you know, Mr. Wall, whether the effects of this strike extended beyond the particular dress industry in which you are interested, that is, if its effects extended beyond the manufacturers' plants in New York?

A. Yes; it did have an effect outside of New York State.

Q. Did it affect production employees outside of New York State?

A. It did.

Q. How?

A. As follows: Many of our manufacturers have inside shops, which are owned by the manufacturers or contractors outside of the State of New York, Pennsylvania as well as Connecticut, and as far south as Maryland, Massachusetts, and several other States, and because of the stoppage of the maintenance service in the buildings, no goods could come out of there to be shipped to these contracting shops, and no goods from the contract shops could be delivered to the place of delivery in New York.

Q. Do you know, Mr. Wall, whether buyers who normally buy in the New York market, or who had by overtures indicated an intention to buy in the New York market went to other markets?

A. Yes; they made statements to the effect that they came to New York City, because of the Easter, approaching Easter, and they needed merchandise, and if they couldn't get it in New York they would go to some other source, perhaps St. Louis or Chicago.

By the COURT:

Q. It is what happens in every strike, isn't it?

A. Not necessarily.

Q. Well——

A. It may not interfere with interstate commerce in every strike.

Q. Oh, I understand, but any strike that ties up production, all these results you are talking about will happen, won't they? Buyers will go to other places?

A. Well, it didn't directly tie up production, but because of the maintenance employees' strike——

Q. I understand.

A. Production itself was tied up.

Q. That is what I say.

A. Workers couldn't get——

Q. This last effect which you speak of, of buyers going to other places, that would happen if the manufacturers' employees were on strike and the place shut down for that reason, wouldn't it?

A. It is possible.

Q. There isn't any difference in the result, is there? All right.

A. No; except that in many instances wants—the needs of the buyers could not be fulfilled by the outside markets.

Mr. BRODIE. We don't contend that there is any difference in the effect.

(Tr. pp. 296–300.)

LOUIS NELSON, having been duly sworn, was examined and testified as follows:

Direct examination by Mr. BRODIE:

Q. Where do you live, Mr. Nelson?

A. 147 Pulaski Street, Brooklyn, New York.

Q. What business are you engaged in?

A. I am managing a trade-union, Local No. 155, International Ladies' Garment Workers Union.

Q. And what branch of the garment workers does that union include?

A. Knitted outerwear.

Q. How long have you been engaged in union work?

A. Over thirty years.

Q. Are you familiar with the strike in February of 1939 of the building employees in New York?

A. I am.

Q. What contact did you have with that strike?

A. Members of our union stopped work with employers and called up the office informing us——

Mr. MASON. Speak a little louder. I can't hear at all what you are saying.

A. (Continued.) Members of our union who are employed in those buildings in knitted outerwear called our office of the union informing us that they couldn't go up to work, for several reasons, one, that the elevators aren't running, second, they have no live steam to steam the cloth, and to press the ready-made garments in the knitted outerwear industry.

By Mr. BRODIE:

Q. Do you know how many knit goods mills in New York were affected?

A. Approximately, about thirty-five.

Q. Do you know what effect the strike had upon the knit goods mills?

A. Many of our members lost——

By Mr. BRODIE:

Q. No; I am talking now about the mills, not so much——

A. About cancellations in the industry?

Q. Yes; cancellations of orders.

A. That is right.

Q. What other effect—were they able to get any raw materials?

A. No; they couldn't.

Q. Were the shops heated during the strike?

A. Oh, no.

Q. During the production of knit goods is there or is there not a constant flow of goods in and out, goods going out to be processed, and then coming back for more work on them, and then going out again for more processing, is that or is that not a characteristic of the industry?

A. Some of them have to go through the different stages three times in the process of manufacturing the garment.

Q. Now, could that flow in and out take place during the strike of the building employees?

A. Oh, no.

Q. In your union, Mr. Nelson, about how many employees were directly affected by the strike?

A. Between nine hundred and a thousand.

Q. And in what way were they affected? Did they lose any time from their work?

A. While the strike was on?

Q. Yes.

A. They couldn't work.

Q. Did they lose any time from their work later?

A. That is right.

Q. Why?

A. Cancellation of orders.

Q. Do you know, Mr. Nelson, whether these thirty-five knit goods mills to which you refer ship their finished products outside the State of New York?

A. New York ships between eighty and ninety percent outside of New York.

Mr. BRODIE. That is all.

ARTHUR J. NEBEL, having been duly sworn, was examined and testified as follows:

Direct examination by Mr. BRODIE:

(Tr. pps. 300–303.)

Q. Where do you live, Mr. Nebel?

A. 719 Drake Avenue, Roselle, New Jersey.

Q. By whom are you employed?

A. Railway Express Agency.

Q. In what capacity?

A. Vehicle supervisor.

Q. In what district or division?

A. Division 3.

Q. Where?

A. The garment area.

Q. Of what city?

A. New York City, pardon.

Q. Are you familiar with the strike of building maintenance employees in February of 1939?

A. Yes.

Q. Just going back to your work a moment, what area is included in Division 3 over which you are supervisor?

A. 28th Street to 38th Street.

Q. And what area was affected by the strike of the building service employees, or in what area did the building service employees go out on strike?

A. Well, for my own territory, that is, speaking of 28th Street to 38th Street——

Q. Yes, sir.

A. Is practically the entire territory.

Q. And what business does the Railway Express Agency do for the manufacturers in that territory?

A. We accept shipments from them to the various parts of the United States, and vice versa, that is, accept shipments all over the United States to these people in the garment area.

Q. Approximately what percentage of the shipments that are made through your facilities by these manufacturers go out of the State of New York?

A. Ninety percent.

Q. And approximately what percentage of the deliveries made by your company to these manufacturers come from points outside the State of New York?

A. Same ratio.

Q. In your business do you generally pick up at street level or do you pick up at the consignor's premises?

A. Consignor's premises.

Q. And when you make deliveries, do you deliver to the consignee's office or shop, or do you deliver to street level?

A. To the office or shop.

Q. During the strike, which lasted according to the testimony before the Court February 1st, 2nd, and 3rd, 1939, were your employees able to pick up and deliver as they did theretofore and as they were when the strike was finished?

A. No; they were not.

Q. Do you keep, or are there kept under your supervision records showing the total number of outgoing shipments and the total number of incoming shipments daily?

A. Yes.

Q. Have you those records with you?

A. Yes; I have them here.

Q. Will you please look at those records?

A. Period of February?

Q. Yes. What is that book you have there?

A. We term it the three-year records, for comparison of costs——

By Mr. MASON:

Q. It is what?

A. A three-year record, we refer to it as a three-year record, for comparison of cost of shipment.

By Mr. BRODIE:

Q. Now, going back to January 25, 1939, will you state the number of outbound shipments that your company handled from the area in which the employees went out on strike about a week later?

(Tr. pp. 309–315.)

By Mr. BRODIE:

Q. Will you answer the question? Go ahead, Mr. Nebel.
A. 17,246 shipments.
Q. And January 26?
A. 18,518.
Q. January 27th?
A. 18,515.
Q. January 28?
A. 15,365.
Q. January 30?
A. 13,038.
Q. 31st?
A. 18,007.
Q. February 1st?
A. 12,675.
Q. Was that the first day of the strike?
A. Yes, sir.
Q. What day of the week was that? Well, I will——
A. I will tell you; I can tell from my records.
Q. All right.
A. Wednesday.
Q. And January 25th was the Wednesday before?
A. Right.
Q. All right. Now, what was your figure for February 1?
A. 12,675.
Q. February 2nd?
A. 14,729.
Q. And February 3rd?
A. 13,785.
Q. That was the last day of the strike?
A. Yes, sir.
Q. How about the 4th; what was that?
A. That was Saturday; 17,731.
Q. How about the 6th?
A. 15,882.
Q. And the 7th?
A. 19,053.

Q. And the 8th?

A. 20,633.

Q. The 9th?

A. 22,751.

Q. And the 10th?

A. 21,874.

Q. Does that book also contain a record of the in-bound shipments?

A. Yes.

Q. Now, before we go to the in-bound shipments I want to make sure that I understand your testimony to be that at least ninety percent of those out-bound shipments are for points outside the State of New York.

A. Yes.

* * * * * *

By Mr. BRODIE:

Q. Mr. Nebel, are you familiar with the extent to which the buildings in the area under your supervision were affected by the strike?

A. Most entirely; I would say probably eighty-five, ninety percent of the buildings were affected in that area.

Q. All right; now, let's go to the in-bound shipments. Turn to January 25th.

* * * * * *

By Mr. BRODIE:

Q. These records of in-bound shipments are made in the same way as the out-bound?

A. Yes.

Q. All right; will you please tell the Court how many in-bound shipments came in or were delivered by you on January 25th, 1939?

A. 4,837.

Q. And on the 26th?

A. 5,600.

Q. On 27th?

A. 5,158.

Q. On the 28th?

A. 4,531.

Q. On the 30th?
A. 7,579.
Q. On the 31st?
A. 5,382.
Q. On the 1st of February?
A. 3,503.
Q. On the 2nd of February?
A. 3,751.
Q. On the 3rd of February?
A. 3,559.
Q. On the 4th?
A. 7,988.
Q. On the sixth?
A. 10,602.
Q. On the 7th?
A. 6,132.
Q. On the 8th?
A. 4,608.
Q. On the 9th?
A. 5,194.
Q. And on the 10th?
A. 5,540.

Q. During this period, Mr. Nebel, during the period covered by the strike, namely, February 1st, 2nd, and 3rd, 1939, did you receive from points outside the State of New York incoming shipments to consignees which you were unable to deliver?

A. Yes.

Q. What did you do with those goods?

A. We would have to carry them over until the following day.

Q. Is it your experience, Mr. Nebel, that any particular day of the week has a fewer number of shipments, under normal circumstances, than other days?

A. Yes.

Q. Outgoing?

A. Yes.

Q. What day of the week is that?

A. Monday is the lightest, and Tuesday is next.

Q. Do you know what relationship this strike had, and the period during which it occurred had to the Easter season in the garment trade?

Mr. MASON. Well, what was the date that Easter came? You know that, Mr. Brodie, I suppose.

Mr. BRODIE. April 9th.

Mr. MASON. Ask him if he knows when Easter came?

By Mr. BRODIE:

Q. Well, do you know when the Easter season began for the garment industry?

A. You are talking about the Easter season?

Q. In 1939.

A. The Easter?

Q. Sir?

A. Talking about the Easter season?

Q. I am talking about the Easter Season.

A. The season would start——

Q. In the dress industry.

A. In 1939 it really started the end of January.

Q. And normally would your out-bound shipments increase daily during that Easter season?

A. Yes.

* * * * * *

(Tr. pp. 317–319.)

EDWARD C. MAGUIRE, having been duly sworn, was examined and testified as follows:

Direct examination by Mr. BRODIE:

Q. Where do you live, Mr. Maguire?

A. 129 East 82nd Street, New York City.

Q. What is your business or profession?

A. I am an attorney at law.

Q. Are you counsel for the Building Service Employees Union in New York?

A. Local 32B.

Q. Are you familiar with the strike of building maintenance employees in 1939 in New York?

A. I am, sir.

Q. Was the local which you represent out on strike, the members of that local?

A. Certain members of it.

Q. Do you know the cause of that strike?

A. Yes, sir.

Q. What was it?

A. A requirement or a demand for increased wages, lowering of hours, and some other minor conditions.

Q. Do you know the number of building employees out on strike during the first three days of February 1939?

A. I do, sir.

Mr. MASON. That is objected to, of course, sir, and all this line.

The COURT. All right; I will take it all subject——

Mr. MASON. Taken subject to my objection.

The WITNESS. I do, sir.

By Mr. BRODIE:

Q. And how many were out on strike?

A. Approximately five thousand five hundred.

Q. Do you know what area was covered by the strike?

A. Yes, sir.

Q. Will you please bound for the Court, by streets, the area in which the buildings were located from which the employees went out on strike?

A. Generally, from 14th Street on the south to 41st Street on the north, the North River to Fifth Avenue, with a fewer number of buildings out towards the lower end. The buildings, the commercial buildings, are more concentrated from approximately 23rd Street up.

Q. Do you know, Mr. Maguire, whether in that area any manufacturing is done?

A. Yes, sir.

Q. Is there?

A. There is.

Q. What is the principal product of that area?

A. Garments.

Q. Have you any idea of the number of garment firms doing business in that area?

A. I do not know the number, sir.

Mr. BRODIE. No further questions.

U. S. GOVERNMENT PRINTING OFFICE: 1941

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7733

PHILIP B. FLEMING, Administrator of the Wage and Hour Division, United States Department of Labor, Appellee,

vs.

A. B. KIRSCHBAUM COMPANY, Appellant,

And afterwards, to wit, the 8th day of October, 1941, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Albert B. Maris, Honorable Charles Alvin Jones and Honorable Herbert F. Goodrich, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 17th day of December, 1941, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 7733. October Term, 1941

PHILIP B. FLEMING, Administrator of the Wage and Hour Division, United States Department of Labor

v.

A. B. KIRSCHBAUM COMPANY, a Pennsylvania corporation,

Appellant.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OPINION

(Filed December 17, 1941)

Before MARIS, JONES and GOODRICH, *Circuit Judges.*

MARIS, *Circuit Judge.*

This is an appeal by the defendant from a judgment of the District Court for the Eastern District of Pennsylvania, 38 F. Supp. 204, which enjoined it from violating Section 15(a) (2) of the Fair Labor Standards Act of 1938, (29 U.S.C.A. §§ 215(a) (2)).

The defendant is the owner of a six story building which it at one time occupied as a factory for the production of

men's clothing. For the past nine years the defendant has done no manufacturing. It leases space in its building to tenants, a number of whom manufacture goods which are shipped in interstate commerce. The defendant employs, among others not herein involved, three elevator operators, two watchmen, three firemen, an engineer, a carpenter, a carpenter's helper and a porter. The court found that the defendant paid those employees at a rate less than that prescribed in Section 6 of the act and employed them for a number of hours in excess of that prescribed in Section 7 without compensating them at the overtime rate therein prescribed. It concluded that this amounted to a violation of Section 15(a) (2) of the act and granted an injunction in accordance with the power conferred upon it by Section 17 of the act.

The defendant's arguments in support of its appeal fall into two general divisions: First, that the wage and hour provisions of the act do not apply to any employees of employers such as this defendant who are not engaged in interstate commerce or in the production of goods for interstate commerce; and Second, that the defendant's employees are not entitled to the benefit of the wage and hour provisions of the act because they are not themselves engaged in interstate commerce or in the production of goods for interstate commerce and also because they are employees in a service establishment and therefore expressly excluded from the benefits of the act by Section 13(a) (2) thereof.

Few courts have dealt directly with the first point raised by the defendant and in those courts which have recognized it as a distinct problem the decisions have not been uniform. Representative of the cases holding that the application of the act is determined by the character of the employee's work is Hall v. Warren Bradshaw Drilling Co., 40 F. Supp. 272 (N. D. Tex. 1941) and of the cases holding that it is determined by the nature of the employer's business as well as by the character of the employee's work is Killingbeck v. Garment Center Capitol, Inc., 259 App. Div. (N. Y.) 691, 20

N. Y. S. 2d 521 (1940). In our view neither the language used in Sections 6 and 7 nor the legislative history of those sections furnish any support for the position taken by the defendant that the coverage of the act is dependent upon the character of the employer's business. Section 6(a) reads: "Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce" wages at a specified rate. Here there is no limitation upon the universality of the class of employers based upon the nature of the employer's business. On the contrary the expression "every employer" is all embracing and includes within its scope employers whose business is not in commerce[1] and who produce nothing for commerce.[2] It is the employee's work which must be in commerce or, in the alternative, in the production of goods for commerce. Equally clear and unambiguous is the language of Section 7(a) which reads: "No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce" for a workweek longer than the prescribed number of hours unless he pays the employee at a fixed overtime rate. The phrase "No employer" certainly may not logically be qualified as meaning "no employer who is engaged in commerce or in the production of goods for commerce" which is the construction urged by the defendant. The emphasis in both sections is clearly placed upon the nature of the employee's work.

That the phraseology used was deliberately chosen by Congress and aptly expresses its intention to make coverage dependent upon the work done by the employee and not upon

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1 The word "commerce" as used in the act is defined by Section 3(b) to mean trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof. 29 U.S.C.A. § 203(b). It is used in the same sense in this opinion.

2 When Congress intended to exclude from coverage on the basis of the employer's business it did so in express terms in Section 13(a) of the act and did not leave the matter to inference or conjecture.

the nature of the employer's business is indicated by the legislative history of the sections. The wage and hour sections of the bill as it had passed the Senate were amended by the House of Representatives so as to read: "every employer engaged in commerce in any industry affecting commerce shall . . . pay, each employee employed by him . . ." certain wages based upon a fixed minimum and "no employer engaged in commerce in any industry affecting commerce shall employ any of his employees . . ." in excess of certain maximum hours without paying overtime compensation.[3] It will be seen that under this amendment the wage and hour provisions of the act were to apply only if the employer was engaged in commerce in an industry affecting commerce. The Senate refused to accede to these House amendments, however, and a conference between the two houses ensued. The conference committee report which was thereafter adopted by both houses substituted for the prior text of the bill the language now embodied in the act. The statement of the House conferees made to the House of Representatives in explanation of the changes proposed by the conference report said, in this connection:

> "Section 6 of the conference agreement provides for the establishment of minimum wages for employees engaged in commerce or in the production of goods for commerce. The House amendment provided for the establishment of minimum wages if the employer was engaged in commerce in any industry affecting commerce. . . ."
>
> "Section 7 of the conference agreement provides for the establishment of maximum hours of employment for employees engaged in commerce or the production of goods for commerce. The House amendment provided for the establishment of maximum hours of employment if the employer was engaged in commerce in an industry affecting commerce. . . ."[4]

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3 82 Cong. Record (1938), pp. 7415, 7419.

4 75th Cong., 3d Sess. House Report No. 2738 to accompany S. 2475.

Nothing in Sections 2, 5 and 8 of the act justifies the conclusion that Congress meant other than it said in Sections 6 and 7. Section 2 expresses the policy of the act to be the elimination of substandard labor conditions in industries engaged in commerce or in the production of goods for commerce. Sections 6 and 7 embody the means chosen to accomplish this purpose, specifically, a statutory minimum standard of wages and maximum standard of hours without overtime wages for all those engaged as workers in commerce or in the production of goods for commerce. Sections 5 and 8, on the other hand, embody a device whereby Congress sought to provide through industry committees a flexible means to accelerate the time within which the minimum wage of 40 cents an hour which it deemed desirable could be made effective in whole industries engaged in commerce without causing serious economic dislocation in any such industry. We conclude that it was the intention of Congress to make the act applicable to all those who are employed in commerce or in the production of goods in commerce without regard to the nature of their employer's business and that this intention was given apt expression in Sections 6 and 7 of the act.

The defendant takes the position that if the act is so construed it violates the Tenth Amendment of the Constitution. That amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The power to regulate interstate and foreign commerce was delegated to the federal government by Article I, Section 8, clause 3 of the Constitution. The regulation by Congress through the Fair Labor Standards Act of 1938 of the wages and hours of those engaged in interstate commerce or in the production of goods for interstate commerce is a valid exercise of the commerce power. United States v. Darby, 312 U. S. 100. Whether the act seeks to regulate commerce by using a classification based upon the general character of the busi-

ness of the industry by which individuals are employed or by a classification based upon the individual character of the work performed by each employee is a matter of statutory construction: Either is a permissible method of exercising the legislative power delegated to Congress by the commerce clause and accordingly does not encroach upon the powers reserved to the states.

The defendant next insists that, even if the coverage of the act is dependent upon the nature of the work done by each employee, the work of the employees involved in the present case is neither in commerce nor in the production of goods for commerce. It is quite obvious that the defendant's engineer, firemen, elevator operators, watchmen, carpenters and porter were not engaged in the production of goods for commerce in the sense that they had actual physical contact with the goods produced. The word "produced," however, was used in no such restricted sense in the act. It is defined at some length in Section 3(j) (29 U.S.C.A. § 203(j)) with the obvious intention of giving it a broader meaning than the one which it has in ordinary usage. The statutory definition is:

> "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

Thus for the purposes of the act an employee is to be deemed engaged in the production of goods for commerce not only when he has direct physical contact with the goods, but also when he is employed in "any process or occupation necessary to the production thereof."

The question before us, therefore, comes down to whether the men with whom we are here concerned were

engaged in an occupation necessary to the production of goods for commerce. We think they were. All the manufacturing tenants in the defendant's building need heat and light; most need elevators to carry men and material up to their respective floors in the building and to take finished product and men down; some need high pressure ("live") steam for pressing and shrinking the materials used by them in the clothing which they manufacture and some need direct electric current without which they cannot operate their machines. It is the work of the engineer and firemen employed by the defendant to produce the heat for the building, the high pressure steam for the pressing and shrinking, the electricity for light and power. It is the work of the elevator operators to carry the materials and finished manufactured product to and from the floors where manufacturing takes place. In each instance the work is so essential to the production of the tenants' goods that if the defendant were not to provide the services the tenants themselves would have had to provide them. The vital necessity to production of the services of elevator operators, engineers and firemen is vividly demonstrated by evidence presented by the plaintiff as to the effects of a strike of building maintenance workers in New York City in 1939. The strike arose out of a dispute concerning wages and hours. It was carried on during the 1st, 2d and 3d days of February and during those three days production of the knitwear and ladies garments manufactured in the building almost came to a standstill. The effect upon shipments in and out of the building was equally drastic. In the case before us the evidence justifies the conclusion that the services of the elevator operators,[5] engineer and firemen were so necessary to the production by the defendant's tenants of goods for commerce as to be indispensable to that production. Although the services of the watchmen, car-

[5] The elevator operators are also directly engaged in commerce, for although their activities take place entirely within the state they carry out one step in the actual transportation of the goods to points outside the state.

penters and porter are not necessary in the sense of being indispensable they are necessary in that they are both convenient and appropriate to the maintenance of a building suitable for the manufacture of goods for commerce.[6]

Finally the defendant contends that its employees are not entitled to the benefits of the wage and hour provisions of the act because they are employed in a service establishment, the employees of which are expressly excluded from the benefits of the act by Section 13(a) (2) thereof. Section 13(a) (2) reads: "The provisions of Sections 6 and 7 shall not apply with respect to . . . any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." It is clear that to come within the exemption not only must the employees render service the greater part of which is in intrastate commerce but they must also be engaged in a "service establishment." The district court found that the employees here involved were not within the exemption because their employer did not operate a "service establishment" within the meaning of the act. We agree with the district court that the defendant's business is not a service establishment.[7] It may be conceded that the defendant's employees render service to the tenants but this service is merely incidental to the business of the defendant which is that of leasing space in its building rather than of selling service. The rendering of some service is incidental to most businesses but they are not thereby necessarily stamped as "service establishments." That term may not be given so broad a

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[6] "Necessary" has frequently been construed to mean "convenient" or "appropriate." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413; Legal Tender Case, 110 U.S. 421, 440; Meriwether v. Board of Directors, 165 F. 317, 319 (C.C.A. 8, 1908); Getchell & Martin Lumber & Mfg. Co. v. Des Moines Union Ry. Co., 87 N. E. 670, 671, 115 Iowa 734; Brooks v. Chicago, W. & V. Coal Co., 84 N.E. 1028, 1031, 234 Ill. 372; Hutcheson v. Atherton, 99 P. 2d 462, 467, 44 N. M. 144.

[7] In direct conflict with this conclusion and upon substantially identical facts is the ruling in Fleming v. Arsenal Bldg. Corporation, 38 F. Supp. 207 (S.D.N.Y. 1941). An excellent note upon this case appears in 41 Columbia Law Review 1260.

meaning since it represents a special exception to the general coverage of the act. Fleming v. Hawkeye Pearl Button Co., 113 F. 2d 52 (C. C. A. 8, 1940).

Had Congress intended the term "service establishments" to include all establishments rendering incidental service it would not have considered it necessary to make specific exemptions in the case of carriers by air, carriers by railway, trolley or motor bus, and telephone exchanges; each of which classes of establishment undoubtedly renders incidental services. Examples of other similar establishments will readily come to mind. It is true that there may be merely a difference in degree between establishments primarily engaged in rendering service—which the act designates as "service establishments"—and those in which the rendering of service is incidental to some other activity. The line between the two types of business may in some cases be difficult to draw. We do not here attempt to draw it but merely decide that the defendant's business is not on the "service establishment" side of the line. In reaching our conclusion we have given weight to the fact that the exemption as to service establishments was added by the conference report to the exemption as to retail establishments already contained in subparagraph (2) of Section 13(a) of the bill. From this it is fair to infer that the type of establishment meant is that which has the ordinary characteristics of a retail establishment except that it sells services instead of goods. In other words it is an establishment the principal activitity of which is to furnish service to the consuming public. Typical retail establishments are grocery stores, drug stores, hardware stores and clothing shops. In Wood v. Central Sand & Gravel Co., 33 F. Supp. 40, 47 (W.D. Tenn. 1940), the court suggested as illustrations of what Congress meant by service establishments "barber shops, beauty parlors, shoe-shining parlors, clothes pressing clubs, laundries, automobile repair shops."

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8 Exempted by Section 13(a) (4), (9) and (11).

We think these illustrations apt. They embrace a class of establishments wholly different from that of the defendant. The conclusion to which we have come makes it unnecessary for us to decide whether the greater part of the service activities of the employees here involved is in intrastate commerce.

We conclude that the employees of the defendant to whom we have referred are entitled to the benefit of the wage and hour provisions of the act and that the defendant was properly enjoined from further violations thereof.

The judgment of the district court is affirmed.

A true Copy:
Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7733

PHILIP B. FLEMING, Administrator of the Wage and Hour Division, United States Department of Labor, Appellee,

vs.

A. B. KIRSCHBAUM COMPANY, Appellant

On appeal from the District Court of the United States, for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Albert B. Maris, Circuit Judge.

December 17, 1941.

Endorsements: Order Affirming Judgment. Received & Filed Dec. 17, 1941. Wm. P. Rowland, Clerk.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, set:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendices to the Briefs of Appellant and Appellee, as constituting the portions of the record before this court at argument; and proceedings in this court in the case of Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, Appellee, vs. A. B. Kirschbaum Company, Appellant, No. 7733, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 3d day of January in the year of our Lord one thousand nine hundred and forty-two, and of the Independence of the United States the one hundred and sixty-sixth.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 2, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.